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No. 05 OFFICE OF THE CLERK

In the Supreme Court of the United States

JAMES M. BANNER, JR., *ET AL.*,
Petitioners,

v.

THE UNITED STATES OF AMERICA, *ET AL.*,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

WALTER SMITH
DC Appleseed Center for Law and Justice
1111 14th St. NW, Suite 510
Washington, DC 20005
202-289-8007

Counsel for Petitioners District of Columbia, Mayor Anthony Williams, District Council, and Individual Council Members

JOHN W. NIELDS, JR
Counsel of Record
Howrey LLP
1299 Pennsylvania Ave. NW
Washington, DC 20004
202-783-0800

GARY THOMPSON
Gilbert Heintz & Randolph, LLP
1100 New York Ave. NW
Washington, DC 20015
202-772-2291

CAROLYN LAMM
White & Case, LLP
701 13th St. NW
Washington, DC 20005
202-626-3605

Counsel for Individual Petitioners

QUESTIONS PRESENTED

Residents of the District of Columbia, who pay the highest (state and local) taxes in the country, challenge on constitutional grounds a unique law enacted by Congress as a result of which District residents are taxed on the income they earn in the District and non-residents are not. This case presents two issues.

1. Whether a tax law enacted by Congress that discriminates against a class of people who lack the vote – a tax law under which tax burdens that would normally be shared by people who have the vote are instead borne solely by those who do not – is subject to heightened scrutiny under the antidiscrimination component of the Fifth Amendment's Due Process Clause?

2. Whether a tax law enacted by Congress that discriminates against the District of Columbia for the benefit of neighboring States is subject to heightened scrutiny under the Uniformity Clause?

PARTIES TO THE PROCEEDING

Petitioners in this case are (1) Citizens of the District of Columbia, namely, James M. Banner, Jr., Henry J. Brothers, II, Marilyn Tyler Brown, Audrey C. Buckner, Jeffrey Haggray, Michael Maccoby, Albrette "Gigi" Ransom, Johnnie Scott Rice, Brenda Lee Richardson, Alice M. [illegible] Pete Ross, Iris J. Toyer, Melody Regina Webb, Bath[illegible] B. Williams, Roger Wilkins, Malcolm L. Wiseman, Jr.; (2) The District of Columbia; (3) Anthony A. Williams, in his official capacity as Mayor of the District of Columbia; (4) The Council of the District of Columbia; (5) Each Member of the Council of the District of Columbia, each in his or her official capacity, namely, Chairman Linda W. Cropp, Sharon Ambrose, Marion Barry, Kwame R. Brown, David A. Catania, Jack Evans, Adrian Fenty, Jim Graham, Vincent C. Gray, Phil Mendelson, Vincent B. Orange, Sr., Kathleen Patterson, Carol Schwartz. Petitioners were plaintiffs and appellants below. Wilbur F. Jackson and Kaye E. Savage were parties to the Complaint as Citizens of the District of Columbia, but were withdrawn on appeal. District of Columbia Councilmembers Sandy Allen, Harold Brazil, and Kevin P. Chavous were parties to the Complaint and Appeal, each in his or her official capacity, but have ceased to hold office and their successors, Vincent C. Gray, Kwame R. Brown, and Marion Barry, respectively, are substituted in their place, pursuant to S. Ct. R. 35.3.

Respondents The United States of America, the United States Department of Justice, and John Ashcroft in his official capacity as Attorney General of the United States were defendants and appellees below. John Ashcroft, in his official capacity as Attorney General of the United States, was a party to the Complaint and Appeal, but has ceased to hold office and his successor, Alberto R. Gonzales, is substituted in his place for this case, pursuant to S. Ct. R. 35.3. Respondents the State of Maryland and the Commonwealth of Virginia were intervenors in the district

court, were appellees in the court of appeals, and are respondents in this Court.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion affirming the dismissal of petitioners' complaint is reported at 428 F.3d 303, and is reprinted in the Appendix hereto ("Pet. App.") at 1a-16a. The district court's opinion granting respondents' Motion to Dismiss the Complaint is reported at 303 F. Supp.2d 1, and is reprinted in Pet. App. 19a–65a.

JURISDICTION

The district court's jurisdiction was based upon 28 U.S.C. §§ 1331 and 1343. The court of appeals entered its

judgment on November 4, 2005. Pet. App. 17a-18a. That court's jurisdiction was based on 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The District of Columbia Home Rule Act provides, in pertinent part, that "[t]he Council [of the District of Columbia] shall have no authority to . . . impose any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District [of Columbia]." D.C. OFFICIAL CODE § 1-206.02(a)(5).

The Fifth Amendment to the United States Constitution provides, in pertinent part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

The "Uniformity Clause" of the United States Constitution provides that: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. CONST. art. I, § 8, cl. 1.

The "District Clause" of the United States Constitution provides, in pertinent part, that Congress shall have the power

> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of

> Congress, become the Seat of the Government of the United States . . . .

U.S. CONST. art. I, § 8, cl. 17.

INTRODUCTION

This case involves an issue of fairness in the tax treatment of citizens who do not have the vote. Congress has passed a unique tax law that discriminates between residents of the District of Columbia and residents of the states. As a result of that law, District residents are taxed on the income they earn in the District and residents of the states are not. Such a discrimination is a sharp departure from the norm. No state discriminates between residents and non-residents in the taxation of income earned within its borders. Neither does the United States for federal tax purposes. Both the states and the United States impose their income taxes on all income earned within their borders regardless of who earns it.

Under the law enacted by Congress, tax burdens that would normally be shared by residents of the states *and* residents of the District are now borne only by residents of the District. As a result, District residents pay the highest (state and local) taxes in the country, and pay income taxes at rates that are about twice the national average. The law was enacted for the benefit of Congress' constituents in the states – those who vote its members in and out of office – and it causes grave harm to residents of the District, who cannot vote and who lack representation in Congress.

The central issue in this case is whether a tax law that discriminates against a class of people who lack the vote, and who constitute a small geographic minority, should be subjected to heightened scrutiny. The petitioners, who include District residents who pay the excessive taxes and

who lack voting representation in Congress, submit that heightened scrutiny is required.

Americans have been deeply suspicious of taxation imposed on people who cannot vote since before the founding of our republic. This Court has repeatedly held that the right to vote is the only effective protection against oppressive taxation. See, e.g., *McCulloch* v. *Maryland*, 17 U.S. 316, 428 (1819); *United States* v. *County of Fresno*, 429 U.S. 452, 458-59 (1977). And where tax laws have discriminated against people who have no right to vote, this Court has struck those tax laws down. See *infra* at 19-20 (citing several precedents). In doing so, this Court has applied a "more rigorous" standard of review to tax laws that discriminate against groups of people not represented in the "legislative halls" of the taxing legislature than it applies to other types of tax discriminations. *Austin* v. *New Hampshire*, 420 U.S. 656, 662 (1975). Heightened scrutiny is also required when Congress passes a tax law that discriminates against a small geographic minority. *United States* v. *Ptasynski*, 462 U.S. 74, 81 (1983).

The court below held that heightened scrutiny of the discrimination in this case was not required, and upheld the dismissal of the Complaint. It concluded that Congress is the District's legislature, and that the fact that District residents *lacked voting representation* in Congress did not matter to the constitutional analysis. Petitioners seek review because we submit that the absence of the vote is central to the constitutional analysis, and that this case raises an issue of federal constitutional law of unusual importance.

The vote – the power of the public to control its representatives in government by voting them in and out of office – is the foundation upon which our system of government is built. It is the reason we trust our

democratically elected legislatures to make the important policy judgments for our society. When a legislature passes a tax law that exempts its voting constituents and imposes extra tax burdens on people who do not have the vote, the reasons for trusting the democratic process are thrown into question; and the reasons for judicial scrutiny increase.

This petition not only raises important and central issues of constitutional law, it raises an issue crucial to the ongoing financial health of the Nation's Capital. As the GAO recently concluded, the inability of the District to tax income earned by non-residents leaves it with a permanent "structural deficit." This means that no matter how efficient it is, the District cannot fund normal levels of government service at normal tax rates. This is a serious problem for our Nation's Capital.

Consequently, petitioners ask this Court to grant the writ. If the writ is granted, petitioners will ask this Court to hold that heightened scrutiny is required, and to hold that the Complaint should be reinstated so that such scrutiny may be applied.

STATEMENT OF THE CASE

1. PETITIONERS' FACTUAL CLAIMS

The facts relevant to this petition are those alleged in the Complaint. When this Court reviews a decision granting a motion to dismiss a Complaint for failure to state a cause of action, the facts alleged in the Complaint are accepted as true. *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993).

A. The Discrimination

In 1973, the United States Congress enacted a statute providing that the District Council "shall have no authority to . . . impose any tax on the whole or any portion of the personal income . . . of any individual not a resident of the District . . . ." D.C. OFFICIAL CODE § 1-206-02(a)(5) (hereinafter "the Prohibition").[1] Pet. App. 75a ¶ 24 (Complaint). Congress has never itself imposed a tax on such income.

Consequently, under the taxing scheme created by Congress, District residents pay taxes on the income they earn in the District, and non-residents do not. *Id.* at 68a ¶ 2, 76a ¶ 26. The Prohibition thus discriminates in favor of Congress' constituents – those who vote its members in and out of office – and against the unrepresented residents of the District of Columbia. *Id.* at 75a ¶ 25.

The legislative history of the Prohibition shows that the Members of Congress from Maryland and Virginia opposed a non-resident tax simply on the ground that it would "adversely affect" their constituents. Senator Scott of Virginia said "I am concerned that there would be anything in the bill that would *in any way adversely affect citizens of nearby Virginia*, such as a commuter tax . . . ."[2] Representative Gude of Maryland, Representative Broyhill of Virginia, and Senator Scott of Virginia all spoke against a tax

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[1] The D.C. Code provision is a codification of the District of Columbia Self-Government and Governmental Reorganization Act, § 602(a)(5), 87 Stat. 774 (1973), known as the "Home Rule Act."

[2] See "Home Rule for the District of Columbia," Legislative History of the District of Columbia Self-Government and Governmental Reorganization Act of 1973, Pub. L. No. 93-198, 93rd Congress, 2nd Session, Committee Print ("Leg. Hist.") at 2750 (emphasis added).

on non-resident income. Leg. Hist. at 1123, 1370-71, 2762-63. Although the Prohibition departed sharply from the firmly established principle of income taxation discussed immediately below, Chairman Rees of California said during the debates that he "doubted there would be five votes on the floor on either side" for a non-resident income tax in the District of Columbia. Leg. Hist. at 988.[3]

B. The Generally Accepted Principle of Taxation: Income is Taxed Where Earned

This discrimination is abnormal in the extreme. It is a universal principle of taxation that the primary right to tax income belongs to the jurisdiction in which the income is earned. Pet. App. 76a ¶ 26. See T. Kaye, *Show Me The Money: Congressional Limitations On State Tax Sovereignty*, 35 HARV. J. ON LEGIS. 149, 170-71 (1998) ("[I]t is a firmly established principle, both internationally as well as domestically, that the jurisdiction in which income is earned has the primary right to tax that income."). Every State that imposes an income tax at all (41 of the 50 States do so), imposes the income tax on all income earned within its borders – regardless of the residence of the earner. Pet. App. 76a ¶ 26.

Puerto Rico and all of the territories also impose their income taxes on all income earned within their borders. *Id.* Similarly, the United States and other countries around the

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[3] The Prohibition benefits not only Maryland and Virginia, but the other states as well. Professional athletes, entertainers, partners in multi-jurisdictional law firms and other professional firms, as well as others who live in New York, California, Illinois, Texas and many other states are relieved from paying taxes to the District on their District source income.

world impose their income taxes on all income earned within their borders regardless of the residence of the earner. *Id.*[4]

This taxation principle does not result in double taxation. The States with income taxes, including Maryland and Virginia, provide their residents with credits for any income taxes paid to jurisdictions where they work. *Id.* at 76a ¶ 27.[5]

C. Non-Residents Thus Normally Are Required To Pay For The Costs They Impose On The Jurisdiction Where They Work

The rationale for this universal system of interjurisdictional taxation is that non-residents who earn their living in another jurisdiction impose costs on that jurisdiction and benefit from services paid for by that jurisdiction. This Court held in *Shaffer* v. *Carter*, 252 U.S. 37, 50 (1920), that a non-resident may be "required through income taxation to contribute to the governmental expenses of the State whence his income is derived." As the Court explained:

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[4] A State may sometimes choose to trade the right to tax income earned within its borders by residents of some other State, in return for a reciprocal agreement by that other State. See Pet. App. 76a ¶ 26. A State will, of course, do this only if it receives approximately the same financial benefit from the trade as it would have received from the tax.

[5] Because of this system of credits, the burden of the income taxes imposed on non-residents throughout this country falls not on the non-residents themselves, but on the treasuries of the states where they live. These states may, of course, raise their taxes on all of their citizens to recoup the revenues lost to the states in which some of their residents work.

> That the State . . . [would be] debarred from exacting a share of [the non-residents'] gains in the form of income taxes for the support of government . . . is a proposition *so wholly inconsistent with fundamental principles as to be refuted by its mere statement.*

Id. (emphasis added). Thus, in every State that has an income tax, non-residents who earn their income in that State are required through income taxation to contribute to the costs of State and local government.

Maryland and Virginia residents who work in the District impose substantial costs on the District. Pet. App. 68a ¶ 4. The population of the District doubles in size during the daytime when non-residents come in to work. Costs of transportation, police, fire and utilities among many others increase proportionally. *Id.* at 78a ¶ 36. Because of the taxing scheme enacted by Congress, non-residents are relieved of the obligation to pay for these costs through income taxation. The costs they impose on the District must be borne instead by District residents.

D. The Prohibition Results in a Structural Imbalance, Inevitably Causing District Residents to be Overtaxed

Because of the Prohibition, the District suffers from a "structural imbalance" such that it cannot raise the funds needed to provide normal levels of services without overtaxing its residents. *Id.* at 79a ¶ 38 (quoting *District of Columbia: Structural Imbalance and Management Issues* (the "GAO Report")).[6] This is the unambiguous conclusion

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[6] The GAO Report is available for viewing in full at the following web address: http://www.gao.gov/new.items/d03666.pdf.

reached by the General Accounting Office of the United States government in a report dated May 2003. See GAO Report. *Id.*[7]

The GAO Report defines "structural imbalance" as follows: "[a] fiscal system is said to have a structural imbalance if it is unable to finance an average . . . level of services by taxing its funding capacity at average . . . rates." GAO Report at 3. The GAO concluded that there is a "substantial structural imbalance" in the District, stating: "even if the District's services were managed efficiently, the District would have to impose above-average tax burdens just to provide an average level of services." *Id.* at 8; *accord* Pet. App. 79a ¶¶ 39, 40. The GAO made clear that this structural imbalance exists *after* taking account of all "federal grants" to the District each year. GAO Report at 8; Pet. App. 82a ¶ 48.

The size of the structural imbalance is significant. The GAO concludes that if the District were to tax its residents at average tax rates, its revenues would fall short of the amount needed to provide an average level of services by as much as $1.1 billion each year. GAO Report at 8; *accord* Pet. App. 80a ¶ 41. The total District annual budget is under $7 billion. Pet. App., 80a-81a ¶ 44. The structural deficit in the District is larger than the structural deficit in any State in the Union on a per capita basis. GAO Report at 40-41.

The GAO Report states that the structural deficit results, among other things, from the fact that "unlike that of any state, the District's government is prohibited by Federal

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[7] At the time that the GAO Report was published the GAO was known as the General Accounting Office. Effective July 7, 2004, the GAO's legal name became the Government Accountability Office. Pub. L. 108-271, 118 Stat. 811 (2004).

law from taxing District-source income of non-residents." Pet. App. 80a ¶ 42. The Prohibition costs the District between $530 million and $1.4 billion in tax revenues each year. *Id.* at 69a-70a ¶ 7.

Taxation is a zero sum game. The removal of non-resident income from the District's tax base means that more tax revenues must be raised from residents. Thus, in light of the Prohibition, the District government has had no choice but to overtax its residents in order to make ends meet. *Id.* at 69a ¶ 5, 80a ¶ 41. As a direct consequence, District residents pay income taxes at rates that are about twice the national average. *Id.* at 80a ¶ 43. And by most measures, District residents pay higher taxes than the residents of any state in the Union. *Id.* at 69a ¶ 5.

E. A Non-Resident Income Tax Would Cure the Structural Imbalance

If the Prohibition were lifted, the District would impose its income tax on residents and non-residents alike. *Id.* at 74a ¶ 21, 83a ¶ 54. It could then cut its income tax rates in half – thus approximating the national average – and still raise more income tax revenues from the combination of residents and non-residents than the current inflated income tax raises from residents alone. *Id.* at 80a-81a ¶ 44. The structural imbalance would thus be cured. And the District would be on a sound financial footing. *Id.* at 82a-83a ¶ 53.[8]

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[8] Non-residents earn about 70 percent of all income earned in the District and residents earn about 30 percent. *Id.* at 80a-81a ¶ 44.

F. The "Federal Payment"

A Federal Payment was made to the District each year from the time of the passage of the Home Rule Act in 1973 until 1997, just as there had been federal payments before home rule. See *id.* at 81a ¶ 46. The purpose of the Federal Payment under the Home Rule Act was to compensate the District for revenues it lost due to the presence of the federal government, such as losses resulting from the inability to tax real property owned by the federal government. *Id.* at 81a ¶¶ 46, 47. Congress abolished the Federal Payment in 1997 as part of the Revitalization Act.[9] *Id.*

No Federal Payment has been made since 1997. Since 1997, Congress has directly funded certain local District functions including the courts and the prison system. Neither the Federal Payment when it was being made, nor Congress' direct funding of certain District functions subsequent to the abolition of the Federal Payment, cured the structural imbalance. *Id.* at 79a ¶ 39, 81a-82a ¶¶ 47-48. The District government implored Congress to continue the Federal Payment after 1997 to permit it adequately to fund needed District services.[10] These pleas fell on deaf ears.

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[9] See Section 11601 of The National Capital Revitalization and Self-Government Improvement Act of 1997, Title XI of the Balanced Budget Act of 1997, Pub. L. No. 105-33 ("Revitalization Act").

[10] See, e.g., *The White House Proposal for the District of Columbia: Joint Hearing Before the Subcomm. on the District of Columbia of the House Comm. on Government Reform and Oversight and the Subcomm. on Oversight of Government Management, Restructuring and the District of Columbia of the Senate Comm. on Government Affairs*, 105th Cong. 64 (Mar. 13, 1997) ("Joint Hearing") (statement of Mayor Marion Barry); Joint Hearing at 117 (statement of Sen. Joseph Lieberman); *id.* at 181 (statement of Anthony Williams, CFO of the District of Columbia); *id.* at 168 (prepared statement of Dr. Andrew F. Brimmer); *The White House*

G. Congress Enacted the Prohibition for the Benefit of its Voting Constituents Knowing It Would Harm District Residents, Who Have No Vote.

Congress has known full well that the ban on taxing non-resident income has harmed the District. Thus, in the Revitalization Act, Congress recognized that it "has imposed limitations on the District's ability to tax income earned in the District of Columbia," and that this and other factors "play a significant role in causing the relative tax burden on District residents to be greater than the burden on residents in other jurisdictions in the Washington, D.C. Metropolitan area and in other cities of comparable size." Revitalization Act § 11601 (c) (1), 111 Stat. at 778.

Although Congress was aware of the unfairness caused to District residents by the Prohibition, it declined to repeal it because repeal would be against the interests of its constituents. Thus, in 1976 and 1978 Congress considered bills to repeal the Prohibition. Rep. McKinney of Connecticut commented on the importance of preserving the financial health of the District, so that it could provide necessary services to residents and non-residents alike. He said, "I hope that our friends from Virginia and Maryland ponder this question at length before they reject the concept of commuter taxes outright."[11] But Rep. Harris of Virginia

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Proposal for DC Business and Community Leaders' Perspective: Hearing Before the Subcomm. on the District of Columbia of the House Comm. on Government Reform and Oversight, 105th Cong. 8 (Mar. 25, 1997) ("Hearing") (statement of John Green, President, District of Columbia Chamber of Commerce); Hearing at 41 (statement of Carol O'Cleireacain, Brookings Institution).

[11] *Commuter Tax: Hearings And Markup On H.R. 11579 & 14621 Before the Subcomm. on Fiscal Affairs and the House Comm. on the*

explained that although he was trying "not to act in his self-interest" when considering District matters, "it is impossible to be altruistic when it comes to the commuter tax question."[12]

The preference Rep. Harris showed for the interests of his constituents – the people who voted him into office – is a preference likely to be shown by all democratically elected representatives towards their constituents.

II. PROCEEDINGS BELOW

A. The Complaint

Shortly after the GAO Report was issued, citizens of the District of Columbia, who pay the unusually high taxes imposed on District residents, filed a Complaint challenging the constitutionality of the Prohibition. The Complaint was filed on July 24, 2003, in the United States District Court for the District of Columbia.[13] It named the United States and the Attorney General of the United States as defendants and sought a declaration that the Prohibition was unconstitutional.

The Complaint alleged that the Prohibition violated the anti-discrimination component of the Fifth Amendment's Due Process Clause. See *Weinberger* v. *Weisenfeld*, 420 U.S. 636, 638 (1975) (the anti-discrimination component of

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District of Columbia, 94th Cong. 10 (1976) (statement of Rep. McKinney).

[12] *Commuter Tax: Hearings and Markup on H.R. 11303 & 10116 Before the Subcomm. on Fiscal Affairs and the House Comm. on the District of Columbia*, 95th Cong. 190 (1978) (statement of Rep. Harris).

[13] The District of Columbia, the Mayor of the District of Columbia, and the Council of the District of Columbia joined in the lawsuit.

the Due Process Clause matches "precisely" the standards found in the Equal Protection Clause). The Complaint also alleged that the Prohibition violates the Uniformity Clause, Article I, Section 8, Clause 1. The Complaint alleged that the discrimination required heightened scrutiny because it was a tax law disfavoring a group of people who lack the right to vote, and because it is a tax law singling out a small geographical minority for disfavored treatment. *See* Pet. App. 83a ¶ 57, 86a ¶ 67.

B. The District Court's Decision

In a memorandum opinion and order issued March 11, 2004, the district court granted the defendants' motion to dismiss. That court noted at the outset that "the unfairness of the District's situation is obvious and regrettable." *Id.* at 20a. Indeed, elsewhere in its opinion the court stated that it "appreciate[d] the manifest inequity created by the District's inability to tax commuters." *Id.* at 63a. Nevertheless, the court said that it "lack[ed] the power to grant the remedy that Plaintiffs seek." *Id.* The court concluded that heightened scrutiny was not required. In the court's view, the District's "unique constitutional position results in unfairness." *Id.* at 20a. Accordingly, the court reasoned, because of the District's "unique status within our constitutional framework," it follows that "despite its apparent unfairness, the legislative scheme at issue here is not unconstitutional. . . ." *Id.* at 63a.

C. The Court of Appeals' Decision

The Court of Appeals for the District of Columbia Circuit affirmed the dismissal of the Complaint in an opinion dated November 4, 2005.

The court declined to apply heightened scrutiny to the petitioners' due process discrimination claim. First, the court of appeals said that plaintiffs' "most obvious avenue to heightened scrutiny" – that District residents are a suspect class because they cannot vote – was blocked in the Court of Appeals for the D.C. Circuit by an earlier *en banc* decision of the Circuit.[14] Second, the court held that this Court's decisions striking down state laws discriminating against residents of *other* states were inapposite. The court said "Congress, when it legislates for the District, stands in the same relation to the District as a state legislature does to residents of *its own* state." Pet. App. at 9a (italics in original). The court regarded as unimportant the fact that state residents elect their legislatures, whereas District residents have no "voting representation in Congress." *Id.* The court also declined to apply strict scrutiny to the Uniformity Clause discrimination claim. The court then concluded that the Prohibition survived the rational basis test.

REASONS FOR GRANTING THE WRIT

In this country, fairness in the tax treatment of people who lack the vote presents an issue of special importance. The Founding Fathers were deeply suspicious of taxation without representation.[15] Our Declaration of Independence

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[14] *United States* v. *Cohen*, 733 F.2d 128, 136 n.12 (D.C. Cir. 1984). *Cohen* did not involve any issue of taxation, and for the reasons described, *infra*, at 22-23 at n.21, the claim in this case is fundamentally different from the one in *Cohen*.

[15] Dozens of prominent histories trace the colonialists' ongoing fervent objections to taxation without representation from 1764 to 1776. See, e.g., Edmund S. Morgan and Helen M. Morgan, *The Stamp Act Crisis: Prologue to Revolution* (1995); Edmund S. Morgan, *The Birth of the Republic, 1763-89* (3d ed. 1992); John P. Reid, *Constitutional History of the American Revolution. The Authority to Tax* (1987); Robert

condemned "imposing taxes on us without our consent."[16] And few beliefs were held more strongly by our Founding Fathers than the belief that the only effective check on oppressive taxation is elected representation.[17]

Consequently tax laws *discriminating* against a class of citizens who lack representation in the taxing legislature raise extremely troubling and important questions. So, too, do tax laws that oppress one part of the Union for the benefit of another part. Moreover, the tax law at issue in this case has an enormous ongoing impact on the financial health of our Nation's Capital.

A. The Right to Vote is Crucial to Fair Taxation

This Court has emphasized repeatedly that the right to vote is the only effective check on the unfair exercise of the government's taxing power. See, e.g., *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat) 316, 428 (1819) ("The only security against the abuse of [the taxation] power is found in the structure of the government itself. In imposing a tax, the legislature acts upon *its constituents*. . . ." It is "the influence

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Middlekauff, *The Glorious Cause, the American Revolution*, 1763-1789 (1982).

[16] This clause in the Declaration was thought of as "the grand foundation of the contest." Reid, *supra*, at 105 (citations omitted).

[17] Scholars widely hold, and describe in much detail, that the colonists viewed all forms of British taxation without representation as oppressive and unjust – curable only by representation – and that these objections were at the root of the formation of our nation. See, e.g., Morgan & Morgan, *The Stamp Act Crisis*, *supra*, at 307 (reviewing the history from 1765-76 in detail and concluding "[F]rom 1765 to 1776 they denied the authority of Parliament to tax them externally or internally . . . [until] they stood 'bluff' in 1776 on the line they had drawn in 176[illegible]."); Reid, *supra*, at 105 (reviewing in detail the history of the complaints against oppressive taxation without representation).

of the constituent over their representative" that "guard[s] them against . . . abuse") (emphasis added); *United States* v. *County of Fresno*, 429 U.S. 452, 458-59 (1977) ("The people of a State, therefore, give to their government a right of taxing themselves and their property. . . . resting confidently on the *interest* of the legislator, and on the *influence of the constituents over their representative*, to guard them against its abuse. A State's *constituents* can be relied on *to vote out of office* any legislature that imposes an abusively high tax on them") (emphasis added). See also *Commissioner* v. *Gerhardt*, 304 U.S. 405, 412 (1938) (Only taxation by a people's "representatives" is "subject to political restraints which can be counted on to prevent abuse.").

B. Tax Laws that Discriminate Against Non-Voters Are Suspect

Consequently, tax laws that *discriminate* against groups of people who lack the vote have been viewed with extreme disfavor. The Framers wrote into our Constitution a requirement that all federal taxes must be uniform, so that voters and non-voters will pay the same taxes. See U.S. CONST. art. I, sec. 8, cl. 2.[18] When this Court permitted federal taxes to be imposed on District residents by Congress, it did so because District residents were guaranteed "equal" treatment. This Court explained that "the principle of uniformity, established in the constitution,

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[18] Hugh Williamson, one of the signers of the Constitution, explained that the purpose of the Uniformity Clause "was that Congress might not have the power of imposing unequal burdens; that it might not be in their power to gratify one part of the Union by oppressing another." 2 Annals of Congress 378 (1792) (cited in *Playynski*, 462 U.S. at 81). He further stated that the Framers were concerned that "the Representatives of one part of the Union might attempt to impose unequal taxes, or to relieve their constituents at the expense of other people." *Id.*

secures the district from oppression in the imposition of indirect taxes," and that "the principle of apportionment, also established in [our] constitution, secures the district from any oppressive exercise of the power to lay and collect direct taxes." *Loughborough* v. *Blake*, 18 U.S. 317, 325 (1820) (Marshall, C.J.). And when this Court upheld the right of a state to tax non-residents of that state it did so only if the taxes are "not more onerous" than the taxes imposed on residents. *Shaffer*, 252 U.S. at 52.

Even more importantly, this Court has repeatedly struck down state tax laws that discriminated in favor of the state's own constituents and against citizens or residents of other states who were not represented in the taxing state's legislature. These discriminatory tax laws were struck down by this Court under the Equal Protection Clause[19] and under the Privileges and Immunities Clause.[20]

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[19] *Wheeling*, 337 U.S. at 572 (Ohio imposed intangible property tax on non-residents and out of state corporations but not on Ohio residents or corporations: law held unconstitutional); *WHYY, Inc.* v. *Glassboro*, 393 U.S. 117, 118-19 (1968) (New Jersey law made domestic non-profit corporations exempt from property tax, but did not exempt out of state non-profits: law held unconstitutional); *Metro. Life Ins. Co.* v. *Ward*, 470 U.S. 869, 880 (1985) (Alabama law taxed non-resident insurance companies at higher rate than domestic insurance companies: law held unconstitutional); *Williams* v. *Vermont*, 472 U.S. 14, 23 (1985) (Vermont automobile use tax applied in a way that discriminated against certain non-residents; tax held unconstitutional).

[20] *Ward* v. *Maryland*, 79 U.S. (12 Wall) 418, 430 (1871) (Maryland law imposed higher fees on trading by non-resident traders than residents: law held unconstitutional); *Travis* v. *Yale Mfg. Co.*, 252 U.S. 60, 79 (1920) (New York tax scheme granted residents certain income tax exemptions not available to non-residents: tax scheme held unconstitutional); *Austin* v. *New Hampshire*, 420 U.S. 656, 666 (1975) (New Hampshire law taxed income earned by non-residents but not residents: law held unconstitutional); *Lunding* v. *New York Tax Appeal Tribunal*, 522 U.S. 287, 311 (1988) (New York tax law granted income tax deductions for

This Court's decisions have applied a more rigorous standard of review to state tax laws that discriminate against residents of other states, who have no vote in the taxing state's legislature, than is applied to other tax discriminations. Thus, in *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562 (1949), this Court struck down, on Equal Protection grounds, an Ohio tax law that discriminated against residents of other states. A few years later, however, this Court upheld an Ohio tax law that discriminated against Ohio residents. *Allied Stores Inc.* v. *Bowers*, 358 U.S. 522 (1959). The only important difference between the two cases was the identity of the disfavored group – one was represented in the taxing legislature and the other was not. In a concurring opinion in *Allied Stores*, Justice Brennan explained that both Ohio laws were equally "rational," but that, in the case of the law discriminating against Ohio residents who *were* represented in the taxing legislature, "it is proper to say that any relief forthcoming must be obtained from the State Legislature." *Id.* at 533.

In *Austin* v. *New Hampshire*, 420 U.S. at 663, a Privileges and Immunities Clause case, this Court struck down a New Hampshire income tax law that discriminated against Maine residents who earned income in New Hampshire. Relying on Justice Brennan's concurrence in *Allied Stores*, the Court applied "a standard of review *substantially more rigorous*" to the tax law discriminating against non-residents, and pointed out that "*nonresidents are not represented in the taxing State's legislative halls.*" *Id.* at 662 (emphasis added).

Similarly, in *Metropolitan Life Insurance Co.* v. *Ward*, 470 U.S. 869, 880 (1985), an Equal Protection Clause

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alimony payments made by residents but not nonresidents: law held unconstitutional).

case, a State tax law discriminated against non-resident corporations. This Court struck the law down because the Equal Protection Clause does not permit a state "constitutionally [to] favor its own residents by taxing foreign corporations at a higher rate solely because of their residence." *Metropolitan Life*, 470 U.S. at 878.

Heightened scrutiny is also supported by this Court's decision in *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938). In *Carolene Products*, this Court held that, under most circumstances, Congress' enactments should be presumed constitutional and its legislative judgments granted great deference. However, the Court stated that such deference might be withheld in the case of legislation disadvantaging "discrete and insular minorities" that are in "a position of political powerlessness." *Id.* The *Carolene Products* Court cited two of this Court's previous decisions as examples of situations in which deference might be withheld. *Both decisions dealt with taxation, or other burdens, imposed by a legislature on people not represented in that legislature.* The first case cited is *McCulloch* v. *Maryland*, 17 U.S. at 428. In the part of the *McCulloch* case cited in the *Carolene Products* footnote, the Court addressed a Maryland tax on the federal bank. The *McCulloch* Court stated that "[t]he people of a state . . . give to their government a right of taxing *themselves* and *their* property . . . resting confidently on the interest of the legislator, and on the influence of the constituent over the representative, to guard them against its abuse." 17 U.S. at 428 (emphasis added). The Court in *McCulloch* struck down the tax on the federal bank, pointing out that the tax on the bank fell not on "the constituents of the [Maryland] legislature," but on "the people of all the states." *Id.*

The second case cited is *South Carolina Highway Department* v. *Barnwell Bros.*, 303 U.S. 177, 184 n.2 (1938).

In the part of the *Barnwell* opinion cited in the *Carolene Products* footnote, the Court addressed a rule prohibiting states from adopting regulations affecting interstate commerce which advantage "those within the state" "at the expense of those without." The *Barnwell* Court continues:

> Underlying the stated rule has been the thought, often expressed in judicial opinion, that when the regulation is of such a character that its burden falls principally upon those without the state, *legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.*

Id.

The point in *Barnwell* is that "political restraints" on state legislative action are in place when the action burdens the legislature's constituents – those within the state who vote the legislature in and out of office. But they are absent when the burden falls on those outside who have no vote in the legislature's halls.

This is the precise concept that makes scrutiny appropriate here. The Prohibition *benefits* the people who vote the members of Congress in and out of office. The *burden* of this Prohibition falls on unrepresented District residents. Because they do not vote, the "political restraints" on Congress' action are sharply diminished. And because the residents of the states do vote, the likelihood that their interests will be unfairly preferred is substantial.[21]

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[21] In *United States* v. *Cohen*, 733 F.2d 128 (D.C. Cir. 1984) (Scalia, J.) (*en banc*), the court had before it a law passed by Congress that required

The court below rejected heightened scrutiny in this case, reasoning that Congress is the District's legislature under the Constitution, and thus stands in the same relationship to District residents as a state legislature does to the residents of its own state. But a state's residents elect their legislature; District residents do not elect the Congress. And that, we submit, makes all the difference. A legislature will predictably favor those who vote its members in or out of office – just as Congress did here.

There is reason to distrust the discrimination at work here; and therefore there is a powerful basis for applying heightened scrutiny to petitioners' Fifth Amendment discrimination claim.[22]

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defendants tried for crimes in the District's local and federal courts, and who were acquitted on insanity grounds, to be automatically and immediately committed to a mental institution. Defendants acquitted on insanity grounds in federal courts elsewhere in the country were not subject to this law. The law was challenged on Equal Protection grounds by a District resident acquitted on insanity grounds, who was disadvantaged by it. The court of appeals held that strict scrutiny was not required, and that District residents were not a "suspect class" by reason of their "political powerlessness alone." *Id.* at 135.

In *Cohen*, the law applied to everyone tried in the District – resident and non-resident alike. Moreover, the law was designed to benefit the public in the District who might have been preyed upon by the criminally insane. District residents were, thus, likely to be in both the class of people benefited by the law and in the class disadvantaged by it. There was absolutely no reason to suspect that Congress was acting for the benefit of its voting constituents to the disadvantage of District residents. The same may be said for the overwhelming majority of laws enacted by Congress for the District, and District residents are not generally a suspect class. The Prohibition, however, is different in this respect for the reasons stated above.

[22] "Constitutional law appropriately exists for those situations where representative government cannot be trusted, not those where we know it

C. Heightened Scrutiny Is Also Required Because the Prohibition Discriminates Against a Geographic Minority

Petitioners submit that heightened scrutiny is also required under the Constitution's Uniformity Clause, because the Prohibition constitutes discrimination against a geographic minority. *United States* v. *Ptasynski*, 462 U.S. 74 (1983) (heightened scrutiny applicable to geographic tax discriminations).

Article I, Section 8, Clause 1 of the Constitution gives Congress the power to lay and collect "Duties, Imposts and Excises" in order to "pay for the Debts and provide for the common Defense and general welfare of the United States"; but the Clause also requires that those levies "shall be uniform throughout the United States."[23] The purpose of the Clause was to address the concern that the "regionalism that had marked the Confederation would persist" and that "the National Government would use its power over commerce to the disadvantage of particular states." *Ptasynski*, 462 U.S. at 81.

One of the signers of the Constitution, Hugh Williamson, explained the intent of the Uniformity Clause when speaking to the second Congress:

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can." John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press ed. 1980).

[23] This Court has consistently held that the Uniformity Clause applies to all indirect taxes, including income taxes. *See Ptasynski*, 462 U.S. at 80 ("The Uniformity Clause conditions Congress' power to impose indirect taxes."); *Brushaber* v. *Union Pac. R.R. Co.*, 240 U.S. 1, 18-19 (1916) (holding that the purpose of the Sixteenth Amendment was to include income taxes, regardless of the source of the income, in the class of indirect taxes subject to the Rule of Uniformity).

> The clear and obvious intention of the articles mentioned was that Congress might not have the power of imposing unequal burdens; that it might not be in their power to gratify one part of the Union by oppressing another.

Mr. Williamson explained further that the framers were concerned that:

> the Representatives of one part of the Union might attempt to impose unequal taxes, or to relieve their constituents at the expense of other people.

Id. (emphasis added). 2 *Annals of Congress* 378 (1792) (quoted in 3 Max Farrand, *The Records of the Federal Convention of 1787* 365 (1966)). That is precisely what the Prohibition accomplishes.

Here, Congress has singled out the District for unique, disadvantageous, tax treatment for the benefit of citizens in the rest of the nation – particularly the District's neighboring states. Everywhere else in the nation, the rule of inter-jurisdictional taxation is uniform. All income earned in a state may be taxed by that state. Only for the District has Congress enacted a law departing from this uniform rule. And this Court held in *Ptasynski*, that tax laws applicable only to a single geographic region must be subjected to heightened scrutiny. *Ptasynski*, 462 U.S. at 81.

The application of the Uniformity Clause may not be avoided on the ground that the Prohibition is local tax legislation, not national tax legislation. This argument was anticipated and rejected by this Court in *Binns* v. *United States*, 194 U.S. 486 (1904). In *Binns*, the Court had before it a Congressionally imposed tax on certain licenses in the Territory of Alaska. The Court sustained this tax over a

Uniformity Clause challenge because the tax was purely local: the revenues raised were spent "in Alaska for Alaska." *Id.* at 495. But the Court cautioned, "this opinion must not be extended to any case, if one should arise, in which it is apparent that Congress is, by some special system of license taxes, seeking to obtain from a territory of the United States, revenue for the benefit of the nation, as distinguished from that necessary for the support of the territorial government." *Id.* at 496.

Here the Prohibition had as its sole purpose to confer a tax benefit on Congress' constituents in the rest of the nation.

* * * * *

Congress has passed a law shifting tax burdens that would normally be borne by its voting constituents onto District residents who have no voting power. That law discriminates against the District in order to benefit the surrounding states. The consequences are serious. District residents are subjected to extremely high tax burdens and the Nation's Capital is saddled with a substantial and ongoing structural deficit preventing the District from reaching a sound financial footing for the foreseeable future.

The court of appeals found that heightened scrutiny was not appropriate because "Congress is the District's government," and "Congress, when it legislates for the District, stands in the same relation to the District residents as a state legislature does to residents of *its own* state." Pet. App. at 9a.

This analogy is, we submit, flawed in a very important way. The residents of a state elect their legislature. District residents do not elect Congress. This is an important difference. *No state legislature passes laws designed to*

benefit residents of other states at the expense of the people for whom it is the legislature. Such legislation would harm its voters. Congress enacted such a law here – undoubtedly because it benefited its voters. The Court of Appeals' reasoning takes no account of the fact that the District residents lack the vote – and this we submit is the crucial ingredient in the entire analysis.

Petitioners respectfully submit that this case raises important issues of federal law that are worthy of this Court's attention; and that it also raises an issue of exceptional importance to the financial well-being of the Nation's Capital.

CONCLUSION

The petition should be granted.

Respectfully submitted.

WALTER SMITH
DC Appleseed Center for
Law and Justice
1111 14th St. NW, Suite 510
Washington, DC 20005
202-289-8007

Counsel for Petitioners
District of Columbia,
Mayor Anthony Williams
District Council, and
Individual Council Members

JOHN W. NIELDS, JR.
Counsel of Record
Howrey LLP
1299 Pennsylvania Ave. NW
Washington, DC 20004
202-783-0800

GARY THOMPSON
Gilbert Heintz & Randolph, LLP
1100 New York Ave. NW
Washington, DC 20015
202-772-2291

CAROLYN LAMM
White & Case, LLP
701 13th St. NW
Washington, DC 20005
202-626-3605

Counsel for Individual
Petitioners

FEBRUARY 2, 2006

APPENDIX

APPENDIX A

No. 04-5190

In the United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 4, 2005 Decided November 4, 2005

JAMES M. BANNER, JR., ET AL.,

APPELLANTS

v.

THE UNITED STATES OF AMERICA, ET AL.,

APPELLEES

Appeal from the United District Court
for the District of Columbia
(No. 03cv01587)

John W. Nields, Jr. and *Walter Smith* argued the cause for appellants. With them on the briefs were *Gary S. Thompson* and *Carolyn Lamm*.

Joseph A. Rieser, Jr. and *Joseph R. Price* were on the brief for *amici curiae* District of Columbia Affairs Section of the District of Columbia Bar, et al., in support of appellants.

Michael S. Raab, Attorney, U.S. Department of Justice, argued the cause for federal appellee. With him on the brief were *Peter D. Keisler*, Assistant Attorney General,

Kenneth L. Wainstein, U.S. Attorney, and *Mark B. Stern*, Attorney.

Jerry W. Kilgore, Attorney General, Attorney General's Office of the Commonwealth of Virginia, *William E. Thro*, State Solicitor General, and *Maureen Riley Matsen*, Deputy State Solicitor General, were on the brief of appellee Commonwealth of Virginia.

J. Joseph Curran, Jr., Attorney General, Attorney General's Office of the State of Maryland, and *Michael D. Berman*, Deputy Chief of Litigation, were on the brief for appellee State of Maryland.

Before: CHIEF JUSTICE ROBERTS, *Circuit Justice*,[24] and ROGERS, *Circuit Judge*, and EDWARDS, *Senior Circuit Judge*.[25]

Opinion for the Court filed PER CURIAM.

PER CURIAM: The local government of the District of Columbia is prohibited by Congress from imposing a "commuter tax" from taxing the personal income of those who work in the District but reside elsewhere. Appellants brought suit in the district court challenging the restriction as unconstitutional. They argue that the restriction (1) favors Congress's constituents in the states and discriminates against the unrepresented residents of the District, in violation of the equal protection component of the Fifth Amendment, and (2) contravenes the Constitution's

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[24] Chief Justice Roberts was a member of this court when the case was briefed and argued and is designated Circuit Justice of this court. *See* 28 U.S.C. §§ 42, 43(b).

[25] Senior Circuit Judge Edwards was in regular active service at the time of oral argument.

requirement that "all Duties, Imposts and Excises shall be uniform throughout the United States." U. S. Const. art. I, § 8, cl. 1. The district court rejected both arguments and dismissed the complaint. We affirm.

III.

The Constitution gives Congress exclusive legislative authority in all matters pertaining to the District of Columbia. U. S. Const. art. I, § 8, cl. 17. Congress has employed this power in various ways since the District was first incorporated in 1802. *See Adams v. Clinton*, 90 F. Supp. 2d 35, 47 n.19 (D.D.C.) (three judge court), *aff'd*, 531 U.S. 941 (2000). The District initially contained three separate governments for Georgetown, Washington, and Alexandria. *Id.*[26] In the 1870s, Congress unified the District government under a three-person commission appointed by the President a system that prevailed until 1967, when it was replaced with a commissioner and council, also presidentially appointed. *See* Reorganization Plan No. 3 of 1967, 81 Stat. 948. In 1973, Congress enacted the present form of government, known as "home rule," under which a mayor and council elected by residents of the District exercise certain executive and legislative powers delegated by Congress. *See* District of Columbia Self-Government and Governmental Reorganization ("Home Rule") Act, Pub. L. No. 93-198, 87 Stat. 774 (1973).

Since 1973, Congress has remained closely involved in the management of the District's finances. In addition to requiring enactment of annual appropriations acts for District government expenditures, the Home Rule Act also provides

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[26] Alexandria and District land west of the Potomac River were returned to Virginia in 1846 because, in the words of Congress, "experience [had] shown that [the land] has not been, nor is ever likely to be, necessary for" the seat of government. Act of July 9, 1846, 9 Stat. 35.

for an annual federal payment by Congress to the District in compensation for "the unusual role of the District as the Nation's Capital." § 501(a); *see also* Comm'n on Budget and Fin. Priorities of the District of Columbia, Financing the Nation's Capital, at 1-10 to -12 (1990). This payment amounted to approximately $660 million per year by the mid-1990s. *See Banner v. United States*, 303 F. Supp. 2d 1, 5 (D.D.C. 2004). In 1997, Congress repealed the system of federal payments and began directly subsidizing certain District operations, including Medicaid, the local courts, and the prison system. *See* National Capital Revitalization and Self-Government Improvement Act of 1997, Pub. L. No. 10533, 111 Stat. 712.

At issue in this case is one of the terms of the 1973 "home rule" delegation. The Home Rule Act prohibits the District Council from imposing "any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District." § 602(a)(5); *see* D.C. Official Code § 1-206.02(a)(5) (2001). The provision prevents the District government from taxing the personal income of those who work in the District, but reside outside it.

Plaintiffs are several District residents, the Mayor, the Council of the District of Columbia and its members, and the District of Columbia itself. Together these individuals and entities filed suit against the United States challenging the commuter tax restriction as unconstitutional. They assert that the restriction discriminates against District residents in favor of residents from neighboring states, depriving the District of $30 billion annually in taxable non-resident income (or about $1.4 billion in annual tax revenue at present District tax rates). Compl. ¶¶ 6, 7.[27] As a result, they contend, the

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[27] An individual who resides in one jurisdiction and earns income in another normally incurs tax liability in both jurisdictions. Most states,

District's fiscal system labors under a "structural imbalance" - a revenue shortfall of between $470 million and $1.1 billion annually that would persist "even if the District's services were managed efficiently." *Id.* ¶ 3 (quoting General Accounting Office, District of Columbia: Structural Imbalance and Management Issues 8 (2003)). Plaintiffs claim that this imbalance forces District residents to bear a higher local tax burden than they otherwise would. *Id.* 17.

The State of Maryland and the Commonwealth of Virginia intervened in the district court and, along with the federal defendants, moved to dismiss the complaint. The district court granted the motion, concluding that "the Constitution and binding Supreme Court and Circuit precedent establish Congress' plenary power over the District and its residents and their unique status within our constitutional framework," and that the court "lack[ed] the power to grant the remedy that plaintiffs seek." *Banner*, 303 F. Supp. 2d at 26. Plaintiffs now bring this appeal. We review *de novo* the district court's decision to dismiss the complaint. *See Barr v. Clinton*, 370 F.3d 1196, 1201 (D.C. Cir. 2004).

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including Maryland and Virginia, offer credits to residents who pay income tax in other jurisdictions. Thus, a commuter tax would not necessarily affect the total tax liability of Maryland and Virginia residents who work in the District. The state governments themselves, however, would lose revenue roughly in the amount of the District's gain, and would presumably have to make up the shortfall by raising taxes or cutting spending. *See* Appellants' Br. at 7 & n.7.

IV.

We begin with equal protection.[28] Congress has delegated to the District the authority to tax the personal income of District residents; it has withheld such authority to tax non-residents who work in the District. Appellants argue that this restriction violates the equal protection component of the Fifth Amendment's Due Process Clause. *See Bolling v. Sharpe*, 347 U.S. 497, 498-99(1954).

The first issue in equal protection analysis is whether the distinction drawn by Congress demands heightened scrutiny. *See Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148, 1153 (D.C. Cir. 2004). Strict scrutiny the most demanding variety is warranted if the restriction "jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). A less exacting, but still heightened, standard applies to classifications based on sex. *See United States v. Virginia*, 518 U.S. 515,532

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[28] Appellee the Commonwealth of Virginia raises a threshold challenge to the standing of appellants to invoke the court's jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). The Commonwealth argues that plaintiffs' injury is neither sufficiently particularized nor redressible by the relief sought. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The district court properly disposed of these contentions. The individual appellants' claim that they bear a higher tax burden due to a discriminatory tax "is sufficient to establish standing." *Orr v. Orr*, 440 U.S. 268, 273 (1979). As to redressibility, while a favorable ruling would not automatically remove appellants' burden, relief is sufficiently likely: the District Council has passed a resolution stating that, absent the restriction, it would enact an income tax on non-residents. *See* District Resolution § 2(12); *see also Defenders of Wildlife*, 504 U.S. at 561. Because the individual plaintiffs have standing for each claim, we need not consider the standing of the institutional plaintiffs before proceeding to the merits. *See Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 429 (D.C. Cir. 1998) (en banc).

(1996). Otherwise, equal protection "requires only that the classification rationally further a legitimate state interest." *Hahn*, 505 U.S. at 10.

Appellants' most obvious avenue to heightened scrutiny is blocked. They do not, and could not, argue that District residents form a "suspect class" for equal protection purposes. We have squarely held otherwise. *See Calloway v. District of Columbia*, 216 F.3d 1, 7 (D.C. Cir. 2000) ("a panel of this court may not now depart from the *en banc* court's conclusion that D.C. residents do not comprise a suspect class for equal protection purposes"); *United States v. Cohen*, 733 F.2d 128,136 n.12 (D.C. Cir. 1984) (en banc) (rejecting argument that "distinctive legislative treatment of the District is 'particularly suspect' and thus requires more than a rational basis to support it").

Instead, appellants argue that heightened scrutiny is required whenever a legislature imposes a tax that favors its constituents at the expense of persons who are not represented in the legislature. Br. at 20. They derive this principle from a line of Supreme Court decisions invalidating state tax laws that treat non-residents less favorably than residents. *See Williams v. Vermont*, 472 U.S. 14 (1985); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *Austin v. New Hampshire*, 420 U.S. 656 (1975); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949). None of these cases, however, applied strict scrutiny. In *Williams* and *Metropolitan Life* - the most recent of appellants' cases the Court applied only rational basis review. *See* 472 U.S. at 22-23; 470 U.S. at 875. *Wheeling Steel* did not apply any particular level of scrutiny, likely because it was decided before the elaboration of equal protection categories of review. The tax statute in *Austin* was invalidated only under the Privileges and Immunities Clause of Article IV. *See* U.S. Const., art. IV, § 2; *Austin*, 420 U.S. at 668. That decision therefore neither prescribes heightened scrutiny for equal

protection purposes nor applies to Congress when it legislates for the District. *See Neild v. District of Columbia*, 110 F.2d 246, 249 n.3 (D.C. Cir. 1940) (Privileges and Immunities Clause is "a limitation upon the states only and in no way affects the powers of Congress over the District of Columbia"). If we adhere to the decisions on which appellants themselves rely, we should consider only whether the commuter tax restriction "rationally further[s] a legitimate state interest." *Hahn*, 505 U.S. at 10.

Appellants urge that "[r]egardless of the precise standard, the [Supreme] Court has ultimately struck down all state tax laws that do not treat unrepresented outsiders equally; whereas, tax laws discriminating against a State's own residents who *are* represented- are upheld." Br. at 27. In *Metropolitan Life*, for example, the Court held unconstitutional an Alabama statute that taxed premiums paid to in-state insurance companies at a lower rate than premiums paid to out-of-state companies. Equal protection, the Court ruled, does not permit a state "constitutionally [to] favor its own residents by taxing foreign corporations at a higher rate solely because of their residence." 470 U.S. at 878. Appellants generalize this holding to cover all "tax laws discriminating in favor of a legislature's constituents," including cases where Congress legislates in a manner that discriminates against the unrepresented residents of the District. Br. at 28.[29]

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[29] For this proposition, appellants also lean heavily on a concurrence by Justice Brennan *in Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959), in which the Court sustained an Ohio law exempting certain non-resident personal property from taxation. Justice Brennan sought to distinguish the Ohio law from a similar law treating non-residents *less* favorably that the Court had previously struck down. As the district court recognized, *Banner*, 303 F. Supp. 2d at 13, a "fair reading" of the concurrence reveals that the distinction lay not in any special concern about non-residents' lack of representation in the

Even assuming that *Metropolitan Life* and similar cases can fairly be read for this broader principle, appellants' reasoning encounters a major difficulty. The Constitution grants Congress authority "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States." U.S. Const. art. 1, § 8, cl. 17. Congress, when it legislates for the District, stands in the same relation to District residents as a state legislature does to residents of *its own* state. *See Mercury Press v. District of Columbia*, 173 F.2d 636, 637 (D.C. Cir. 1948) (Congress legislates for the District "in like manner as the legislature of a state" (quoting *Gibbons v. District of Columbia*, 116 U.S. 404, 407 (1886))). "Not only may statutes of Congress of otherwise national application be applied to the District of Columbia, but Congress may also exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes." *Palmore v. United States*, 411 U.S. 389, 397 (1973).

This is true notwithstanding that the Constitution denies District residents voting representation in Congress. *See Adams*, 90 F. Supp. 2d at 72. Indeed, appellants' claim amounts to little more than a collateral challenge to the District's lack of representation. They argue that because District residents are not represented in Congress, Congress's real constituents reside in the states. Therefore, the argument

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legislature, but in equal protection's role in "protect[ing] our federalism." *Allied Stores*, 358 U.S. at 533. A law favoring non-residents, the concurrence observed, "clearly presents no state action disruptive of the federal pattern." *Id.* The same concern about discrimination "disruptive of the federal pattern" does not arise when Congress, "as a legislature of national character," *Neild*, 110 F.2d at 250, exercises its authority over the District.

goes, actions by Congress that favor those constituents over District residents should be deemed suspect. The suggestion is that District residents stand in the same relation to Congress as, say, residents of New York to New Jersey's state legislature - just as New York's residents are not represented in New Jersey's legislature, District residents are not represented in Congress. This argument misses the special character of the District under the Constitution. Congress is not a foreign sovereign government in relation to the District, as the New Jersey legislature is to New York; Congress is the District's government, *see* U.S. Const. art. I, § 8, cl. 17, and the fact that District residents do not have congressional representation does not alter that constitutional reality.

Given Congress's control over the District, appellants must in effect contend that in enacting the commuter tax restriction, Congress has improperly preferred its role as the national legislature to its role as the local one for the District. But in this, their dispute lies with the plan of the Constitution and the judgment of its Framers. The evident purpose of granting Congress authority over the District was to provide the federal government a place where it would not be harassed or neglected by local interests. *See* The Federalist No. 43 (James Madison); 2 Joseph Story, Commentaries on the Constitution of the United States § 1219 (5th ed. 1891) (suggesting that Pennsylvania's refusal to defend the Continental Congress from an angry crowd of disbanded but unpaid Revolutionary War soldiers ultimately led to inclusion of the District Clause). The Framers would naturally have expected that where tensions between local and national interests arose, they could be resolved by Congress with due consideration for the latter. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 429 (1821) (Marshall, C.J.) ("Congress is not a local legislature, but exercises this particular power, like all its other powers, in its high character, as the legislature of the Union. The American

people thought it a necessary power, and they conferred it for their own benefit.").

Of course, none of this is to say that Congress can legislate for the District without regard to other constitutional constraints. *See Palmore*, 411 U.S. at 397. For example, a law employing a suspect classification is hardly immune from close scrutiny because it applies only to the District. But it is to say that there is nothing inherently suspect in the prospect that Congress might give decisive weight to national rather than local considerations when it legislates for the District. The very point of having a national capital area subject to congressional rather than state control was to allow Congress to do just that. Appellants' structural bias argument does not, therefore, support heightened scrutiny under the equal protection component of the Fifth Amendment.

Under rational basis review, the commuter tax restriction must be sustained "if any state of facts reasonably may be conceived to justify it." *Sullivan v. Stroop*, 496 U.S. 478, 485 (1990) (citation omitted). This is not hard to do, and appellants in effect concede the point by acknowledging that a state could constitutionally enact a similar restriction. *See Banner*, 303 F. Supp. 2d at 15. Congress may have been concerned that a commuter tax would cause District businesses to relocate to nearby Maryland and Virginia, where income tax rates are generally lower. *See Allied Stores*, 358 U.S. at 528-29 (under Equal Protection Clause, a state may properly provide incentives for non-residents to do business within its borders). Or it may have decided that the enhanced burden of financing the District's operation should fall on the nation at large, rather than on the residents of neighboring states. These need not have been the actual motives behind the restriction, *see id.* at 528, for their plausibility alone is enough to sustain it under rational basis review.

V.

The Constitution gives Congress the "Power To lay and collect Taxes," but requires that "all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. Const. art. I, § 8, cl. 1. Appellants argue that the commuter tax restriction violates the uniformity requirement because Congress has prohibited a non-resident income tax only in the District, and nowhere else, and has done so "to benefit other portions of the country- most particularly, Maryland and Virginia." Br. at 36.

The Uniformity Clause is not exactly well-trodden constitutional terrain. The Supreme Court has observed that the records of the Constitutional Convention shed only scattered light on its meaning and scope, *see United States v. Ptasynski*, 462 U.S. 74, 80-81 & n.10 (1983), and even until the turn of the last century it was not settled that the clause referred only to *geographical* uniformity. *See Knowlton v. Moore*, 178 U.S. 41 (1900) (settling the matter). Nevertheless, its purpose has been divined from the Framers' concern that Congress "would use its power over commerce to the disadvantage of particular States." *Ptasynski*, 462 U.S. at 81; *see also Knowlton*, 178 U.S. at 103-05.

A special problem arises in applying the Uniformity Clause not to Congress's interstate commerce power, but to its authority over the District and other territories that it governs directly. In such instances it has been understood that Congress may impose local taxes without running afoul of the Clause. *See Mercury Press*, 173 F.2d at 637 ("It has long been established that Congress may constitutionally impose excises in the territories which it governs directly, without making such excises generally applicable to the country at large."). This makes sense. If, in governing the District, Congress can "exercise all the police and regulatory powers which a state legislature or municipal government

would have in legislating for state or local purposes," *Palmore*, 411 U.S. at 397, it undoubtedly has the authority to enact taxes for the District alone, just as a state could. *See Gibbons*, 116 U.S. at 407-08 (Congress has power "to levy taxes for District purposes only, in like manner as the legislature of a State may tax the people of a State for State purposes"). The taxes Congress may assess in the District could hardly be "uniform throughout the United States," and still function as the equivalent of state taxes. Given Congress's authority under the District Clause, the Uniformity Clause would appear to have little relevance to Congress's local taxation of the District.

The Supreme Court has, however, applied the Uniformity Clause in a related context. In *Binns v. United States*, 194 U.S. 486 (1904), the Court considered a challenge to a congressionally-enacted license tax for the territory of Alaska. The basis for the challenge was the fact that revenues from the tax were paid to the federal treasury rather than to a treasurer for the Alaskan territory. The Court observed that the tax's "constitutionality would be clear" if it were paid directly to a local treasurer, *id.* at 492, but nevertheless saw no problem in having the revenues instead paid to the federal treasury, provided that the tax's purpose was to raise revenue for Alaska and "the total revenues derived from Alaska are inadequate to the expenses of the Territory." *Id.* at 494-95.

The Court in *Binns* seems to have understood a local tax on a territory to pose no Uniformity Clause problem as long as it does not cloak a kind of mercantilist policy toward the territory. Thus the Court advised - in dictum never since revisited by the Court that its ruling "must not be extended to any case, if one should arise, in which it is apparent that Congress is, by some special system of license taxes, seeking to obtain from a territory of the United States revenue for the benefit of the nation." *Id.* at 496.

The commuter tax restriction at issue here, of course, does not fit within the letter of this cautionary dictum from *Binns*. It is not a "system of license taxes," but a limitation on Congress's delegation of taxing authority to the local District government. It does not generate surplus tax revenue beyond the needs of the District "for the benefit of the nation." Far from it: the restriction itself, which exempts certain income from taxation, raises no revenue at all.

Appellants argue, however, for a broader reading of *Binns*. According to them, *Binns* stands for the proposition that "when Congress purports to act as a local legislature but in fact acts in part for a national purpose, its action is subject to the limitations of the Uniformity Clause." Br. at 40. Here, they contend, "Congress has enacted a Prohibition on taxes in the District in order to produce revenues not for the District but for other parts of the Nation." *Id.* at 38. In doing so, Congress has "preferr[ed] the States at the expense of the District," *id.* at 37, because the restriction leaves more income to be taxed by the states and less for the District.

There is good reason, however, not to read *Binns so* expansively. Appellants' reading is inconsistent with Congress's constitutional authority over the District. If congressional legislation for the District were scrutinized merely because it had the *effect* of "preferring the States at the expense of the District," Br. at 37, Congress's authority over the District would be much less substantial than the power "[t]o exercise exclusive Legislation in all Cases whatsoever" granted to it by the Constitution. U.S. Const. art. I, § 8, cl. 17. Even routine instances of that authority might be called into question. Indeed, in financing the District, Congress necessarily faces a choice between using revenues from local taxation and general revenues, i.e., revenues largely derived from the states. Any decision to rely more on the former would seem to implicate appellants' reading of *Binns*. For example, if Congress were to cease

funding the local courts, thereby requiring the District government to fund them by raising taxes, Congress could be said "to relieve its constituents at the expense of District residents," Br. at 38, and thus act in violation of the Uniformity Clause. We see no reason to adopt a reading of *Binns* so in tension with Congress's constitutional authority over the District.

The commuter tax restriction is more properly viewed as simply an aspect of Congress's authority to levy local taxes on the District and therefore entirely consistent with the Uniformity Clause. Congress has delegated to the District government the power to levy an income tax while restricting the kinds of income the District may tax. The arrangement is no different from Congress determining how to treat various types of income in the course of imposing an income tax itself. Governments often must decide, as Congress has here, how to treat revenue sources on which another jurisdiction may have a claim. *See, e.g.*, D.C. Official Code § 47-1809.01 (2001) (residency definitions for tax on estates and trusts); *id.* § 47-3703 (tax on transfer of taxable estate of non-residents). If Congress has the authority to impose local taxes on the District and it does, *see Mercury Press*, 173 F.2d at 637 it surely can make such determinations in the course of exercising that authority.

The fact that no state currently exempts all non-resident income from its income tax is of no consequence. Any state could do so tomorrow, *see Allied Stores*, 358 U.S. at 530: would Congress then have the power to enact the commuter tax restriction? Congress's authority over the District is not so precarious. It is enough that the power Congress has exercised here within the District is one that "the legislature of a State *might* exercise within the State." *Palmore*, 411 U.S. at 397 (internal quotation marks omitted) (emphasis added). As such, the restriction does not violate the Uniformity Clause.

It is beyond question that the Constitution grants Congress exclusive authority to govern the District, but does not provide for District representation in Congress. That constitutional plan does not require heightened scrutiny of congressional enactments affecting the District. The policy choices are Congress's to make; we hold simply that the commuter tax restriction does not violate equal protection or the Uniformity Clause of the Constitution. The judgment below is *Affirmed*.

APPENDIX B

In the United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-5190 September Term, 2004

JAMES M. BANNER, JR., *ET AL.*,
APPELLANTS

v.

THE UNITED STATES OF AMERICA, *ET AL.*,
APPELLEES

Appeal from the United District Court
(USDC) for the District of Columbia (No. 03cv01587)

Before: EDWARDS, ROGERS and ROBERTS, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

Date: November 4, 2005

Opinion Per Curiam By: /s/ Michael C. McGrail
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 03-1587 (ESH)

JAMES M. BANNER, JR., *ET AL.*,
Plaintiffs

v.

THE UNITED STATES OF AMERICA, *ET AL.*,
Defendants

MEMORANDUM OPINION

This lawsuit presents yet another chapter in the District of Columbia's longstanding struggle to achieve self-government. The District, its Mayor, its Council and Council members, and eighteen of its residents challenge Congress' refusal to permit taxation of income earned by nonresidents who work within its borders. Plaintiffs contend that the ban constitutes unconstitutional discrimination against residents of the District, who lack the right to vote in Congress. Arguing that commuters in the District should be required to compensate the jurisdiction in which they are employed for the costs they impose, plaintiffs charge that the District's inability to tax nonresidents creates financial deficits not counterbalanced by its federal subsidies, forcing it to impose disproportionately high tax burdens upon its own residents. *Amici* for plaintiffs argue that the District is the only jurisdiction in the United States denied the benefit of taxing income earned within its borders, and that even the federal

government profits from the income earned by foreigners within the nation's borders.[30]

Plaintiffs' grievances are serious, and their goal is a laudable one. The unfairness of the District's situation is obvious and regrettable. Since the establishment of the District, courts have, however, understood that its unique constitutional position results in unfairness. As early as 1805, then Chief Justice Marshall recognized the inequities compelled by the Constitution as he concluded that the Supreme Court could not grant the District the same benefits enjoyed by the states. *See Hepburn & Dundas v. Ellzey*, 6 U.S. (2 Cranch) 445, 453 (1805). Chief Justice Marshall's sentiments have been reiterated in subsequent Supreme Court decisions, as well as in rulings from courts in this jurisdiction, all of which have upheld the District's lack of congressional representation. *See, e.g., Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 324-25 (1820) ("Although in theory it might be more congenial to the spirit of our institutions to admit a representative from the district.... certainly the constitution does not consider their want of a representative in Congress as exempting it from equal taxation."); *United States v. Thompson*, 452 F.2d 1333, 1341 (D.C. Cir. 1971) ("[F]or residents of the District, the right to vote in congressional elections is ... totally denied. This regrettable situation is the product of historical and legal forces over which this court has no control."); *Adams v. Clinton*, 90 F. Supp. 2d 35, 37 (D.D.C.), *aff'd*, 531 U.S. 941 (2000) ("[T]he dictates of the Constitution and the decisions of the Supreme Court bar us" from granting District residents the "right to elect representatives to the Congress of the United States.").

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[30] Concerned with the fiscal health of the District, the District of Columbia Affairs Section of the District of Columbia Bar and most of the Bar's former presidents have joined plaintiffs as *amici curiae*.

This Court is likewise mindful of the unfairness of the situation plaintiffs seek to change. But longstanding judicial precedent compels the Court to conclude that plaintiffs do not enjoy the right they seek to obtain. As has been the case for over two hundred years, the residents of this jurisdiction "must plead their cause in other venues," for this Court has no authority to overturn Congress' ban on a commuter tax. *Adams*, 90 F. Supp. at 72.

BACKGROUND

The District of Columbia is "an exceptional community ... established under the Constitution as the seat of the National Government." *United States v. Murphy*, 314 U.S. 441, 452 (1941).[31] The Constitution grants to Congress plenary legislative authority over the District: "The Congress shall have the power ... [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States ...." U.S. Const. art. I, § 8, cl. 17 ("the District Clause").

Until recently, Congress exercised its exclusive control over the District through direct legislation and the appointment of local governors, with only minimal input from residents. *See Marijuana Policy Project v. United States*, 304 F.3d 82, 83 (D.C. Cir. 2002). In 1871, when Washington City, Georgetown, and Washington County were combined to create the District of Columbia, the Organic Act provided for a presidentially-appointed District governor and a legislature with limited power. *See Dist. of Columbia v.*

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[31] The historical forces that led to the establishment of exclusive federal control over the nation's capital are explained in *Adams*, 90 F. Supp. 2d at 50 n.25.

John R. Thompson Co., 346 U.S. 100, 105 (1953); An Act for the Government of the District of Columbia, ch. 62, 16 Stat. 419 (1871). This attempt to provide the District with territorial home rule lasted only a few years, for Congress revoked the self-government provisions of the Organic Act in 1878, and for almost a century the District was governed by a three-person commission appointed by the President. *See Adams*, 90 F. Supp. 2d at 47 n.19; An Act for the Government of the District of Columbia, and for Other Purposes, ch. 337, 18 Stat. 116 (1874); An Act Providing a Permanent Form of Government for the District of Columbia, ch.180, 20 Stat. 102 (1878).

Between 1948 and 1966, the Senate passed six different bills granting the District some form of home rule, but each time a similar bill died in the House Committee for the District of Columbia. The commissioner system was replaced in 1967 by a presidentially-appointed mayor and council form of government, *see Adams*, 90 F. Supp. 2d at 47 n.19; *see also* Reorganization Plan of 1967, Pub. L. No. 90-623, 81 Stat. 948 (1967), and in 1973, Congress enacted the "Home Rule Act," providing for a mayor and council elected by the citizens of the District. *See* District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified as amended at D.C. Code Ann. § 1-201.01 *et seq.*) ("the Act"). The existing local government provides the District with the most expanded form of self-government to date.

The Home Rule Act delegates to the District of Columbia Council "certain legislative powers," "[s]ubject to the retention of Congress of the ultimate legislative authority over the nation's capital." D.C. Code Ann. § 1-201.02. The Act protects Congress' exclusive legislative authority over the District by providing that Council enactments become law only if Congress declines to pass a joint resolution of disapproval within thirty days (or sixty days in the case of

criminal laws) and by reserving the power to repeal Council enactments at any time. *See id.* §§ 1-206.01,1-206.02(c)(1)-(c)(2).

The Act also specifically limits the Council's lawmaking powers, enumerating matters that are not "rightful subjects of [Council] legislation." *Id.* § 1-203.02. The District may not, for example, impose any tax on federal property; it may not regulate federal or local courts, or the Commission on Mental Health; and it may not permit the construction of buildings taller than certain height restrictions. *See id.* § 1-206.02(a)(1)-(a)(8). Plaintiffs' challenge in this case addresses the Act's commuter tax prohibition (the "Prohibition"), which is among these enumerated limitations: "The Council shall have no authority to ... [i]mpose any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District . . . ." *Id.* § 1-206.02(a)(5).

Congress passed the Home Rule Act as a compromise, granting "the people of the District of Columbia an opportunity in exercising their rights once more and yet with adequate safeguards for the Federal interest component." Home Rule for the District of Columbia, 1973-1974: Background and Legislative History of H.R. 9056, H.R. 9682, and Related Bills Culminating in the District of Columbia Self-Government and Governmental Reorganization Act, at 2106 (1974) (statement of Rep. Diggs, reprinted from the Cong. Rec., Oct. 9, 1973). The Chairman of the Committee on the District of Columbia viewed the legislation as "a reasonable and rational accommodation between the interests of all Americans in their Nation's Capital and the basic principle that government should be responsible to the people." *Id.* at 3052 (statement of Rep. Diggs, reprinted from the Cong. Rec., Dec. 17, 1973).

The Act provided for an annual federal payment to be allotted to the District upon the Mayor's request. To formulate the fund petition, the Mayor was to "prepar[e] an annual budget for the government of the district ... identify[ing] elements of cost and benefits to the district which result from the unusual role of the district as the Nation's Capital," considering, among other things, the "potential revenues that would be realized if exemptions from district taxes were eliminated," and the "relative tax burden on District residents compared to that of residents in other jurisdictions in the ... metropolitan area and in other cities of comparable size." D.C. Code Ann. §§ 1-205.01(a), (b)(3), (b)(9) (repealed 1997). Thereafter, Congress authorized a maximum annual amount for the appropriation. The federal payment was not to exceed $230 million for the fiscal year ending June 30, 1975, $254 million for 1976, $280 million for 1977, and $300 million for 1978. *Id.* §§ 1-205.02 (repealed 1997). By the mid-1990s, the federal payment had increased to $660 million per year.

By 1997, however, lawmakers concluded that the "financial constraints uniquely applicable to the District" required greater federal budgetary and management responsibility "for some very costly District operations which are either state-like functions which virtually no other city in the nation performs, or which are burdens which the federal government itself created and unfairly transferred to the District government as part of the home rule deal." *Hearing before the Senate and House District of Columbia Subcommittees on the President's National Capital Revitalization and Self-Government Improvement Plan*, 105th Cong. (1997) (statement of Charlene Drew Jarvis, District of Columbia Councilmember). Thus, through the National Capital Revitalization and Self-Government Improvement Act of 1997, Pub. L. 105-33, 111 Stat. 712 (§§ 11000-11723) (1997) ("the Revitalization Act"), Congress repealed the federal payment provision of the Home Rule

Act, and began to subsidize some of the District's "state functions," including its transportation and infrastructure system development, pension liabilities, Medicaid program payments, and courts and prison system management.[32]

Through the Revitalization Act, Congress attempted to financially compensate the District for costs associated with "the extraordinary Federal presence," including "crowd control, restrictions on revenue raising capacity because of tax exempt property, height restrictions, and *restrictions on non-residence income taxes*." *Hearing before the House District of Columbia Subcommittee on the White House Plan to Revitalize D.C.*, 105th Cong. (1997) (statement of Andrew Brimmer, Chairman, District of Columbia Financial Responsibility and Assistance Authority) (emphasis added). The "forgone nonresident income taxes" were "estimated to be $1.2 billion annually," an amount only expected to increase "as more District residents migrate to neighboring jurisdictions -- but continue to work in the city." *Id.* Congress was, therefore, directed to take into account the restrictions upon the overall size of the District's economy and the limitations upon its ability to tax income when determining "such amount as may be necessary" for the District's appropriation. *See* Revitalization Act, Pub. L. 105-33, 111 Stat. at 778 (§ 11601(c)(1), (c)(2)(B)). Thus, despite concerns surrounding the discontinuation of the District's federal payment, the Revitalization Act was touted as "'the most promising and certainly the most innovative approach

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[32] The Revitalization Act also provides for U.S. Treasury loans, as well as other grants and tax incentives, in order to "relieve the district government of major financial and managerial responsibilities ... [and] help the city resolve its cash shortfall that stems from its accumulated deficit." *Hearing before the House District of Columbia Subcommittee on President Clinton's Plan to Help Restore the Economic Health of the City*, 105th Cong. (1997) (statement of Franklin Raines, Director, Office of Management and Budget).

yet to emerge for relieving the District government of costs it can no longer shoulder." David A. Vise, *Clinton Proposes U.S. Run Many D. C. Services*, Washington Post, Jan. 14, 1997, at A1 (quoting Del. Eleanor Holmes Norton).

While income tax from commuters would undeniably increase the District's revenues, Congress has chosen to address the District's financial situation through other means, and has rejected every proposed commuter tax since 1975. Bills introduced shortly after the passage of the Home Rule Act sponsored by Representative McKinney (Amendment to the District of Columbia Income and Franchise Tax Act of 1947, H.R. 11579, 94th Cong. (1976)) and Representative Dellums (Amendment to the District of Columbia Self-Government and Governmental Reorganization Act, H.R. 11303, 95th Cong. (1978)) died in committee. More recent proposals introduced by District Delegates Walter Fauntroy (Amendment to the District of Columbia Self-Government and Governmental Reorganization Act, H.R. 2641, 99th Cong. (1985)) and Eleanor Holmes Norton (District of Columbia Fair Federal Compensation Act of 2002, H.R. 3923, 107th Cong. (2002)) have suffered similar fates. Former District Mayor Sharon Pratt Kelly launched a highly-publicized campaign in 1992 promoting a commuter tax, but gave up her efforts in response to political pressure. *See* Kent Jenkins, Jr., *Kelly Drops Commuter Tax Effort*, Washington Post, Dec. 6, 1992, at A1.

Plaintiffs now challenge Congress' refusal to permit passage of a commuter tax. While plaintiffs cite to the Equal Protection, Uniformity, and Privileges and Immunities Clauses as the grounds for invalidating the Prohibition, these claims are premised on a series of Supreme Court tax cases that plaintiffs use to craft a legal principle outlawing discrimination in the imposition of taxes against unrepresented citizens in favor of represented ones. Applying this principle to Congress' ban on the District's use

of a commuter tax, plaintiffs argue that the Prohibition must be invalidated.

Defendants and the intervenors (the State of Maryland and the Commonwealth of Virginia) have moved to dismiss plaintiffs' claims.[33] As an initial matter, they challenge the Court's subject matter jurisdiction arguing that plaintiffs lack standing to challenge the Prohibition and that the issue is nonjusticiable because it presents a political question. As to the merits, defendants and the intervenors seek dismissal on the grounds that since Congress' prohibition on a commuter tax is constitutionally permissible under its plenary power over the District, there is no legal basis for invalidating Congress' action. Having heard oral argument on the motions to dismiss on February 17, 2004, the Court will now turn to defendants' jurisdictional arguments, as well as their arguments regarding plaintiffs' constitutional claims.

JURISDICTION

VI. STANDING

Plaintiffs have standing if they have suffered an "injury in fact," are able to establish a causal connection between the injury and the offensive conduct, and demonstrate that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

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[33] Plaintiffs have named the United States, the Department of Justice, and Attorney General John Ashcroft as defendants. The Commonwealth of Virginia and the State of Maryland joined the defendants as intervenors and have moved to dismiss plaintiffs' complaint as well. An *amicus* brief in support of Virginia's motion was filed by the Virginia jurisdictions of Fairfax County, Loudoun County, Prince William County, the City of Alexandria, the City of Falls Church, the City of Manassas, and the City of Manassas Park.

The complaint alleges that approximately 500,000 residents commute into the capital each workday, imposing significant uncompensated costs on the District. As a result of the District's inability to tax these commuters, the individual plaintiffs "bear substantially higher than normal tax burdens," while the District "perennially suffers revenue deficiencies," as well as "an inability to fund critical infrastructure improvements."[34] (Compl. ¶¶ 50-52.) These injuries are not "conjectural or hypothetical," they are specifically alleged, and they are suffered only by the District and its residents. *See Lujan*, 504 U.S. at 560-61. Thus, contrary to defendants' contention, plaintiffs' challenge is not a generalized taxpayer grievance where the injury is undifferentiated and common to all members of the public. *See id.* at 575-76. Instead, the legislative act at issue allegedly unconstitutionally burdens a particular class of citizens, and "[t]he burden alone is sufficient to establish standing." *Orr v. Orr*, 440 U.S. 268, 273 (1979).[35]

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[34] Plaintiffs describe the District's financial situation by reference to a United States General Accounting Office report, issued on June 5, 2003, which concluded that there is a "substantial structural imbalance in the District," meaning that "even if the District's services were managed efficiently, the District would have to impose above-average tax burdens just to provide an average level of services," despite the District's receipt of federal funds. (Opp. at 10; Compl. ¶¶ 38-40.) The District's inability to tax nonresidents' income, plaintiffs maintain, deprives it of up to $1.4 billion in tax revenues each year, forcing it to tax its residents at a higher rate while providing them fewer services. If the District were to tax its residents at average rates, they allege, its revenues would fall short by between $470 million and $1.1 billion each year. At this stage, the Court must accept plaintiffs' factual allegations as true for purposes of deciding defendants' motions to dismiss.

[35] Defendants argue that the District and its Council lack standing because they "have neither a 'right' nor a 'legally-protected interest' in making any legislative determination for the District." (Mot. at 17.) This position misconstrues the standing requirement. The Court must presume for purposes of standing analysis that plaintiffs have the right

The complaint also contains sufficient allegations to establish a causal connection between the injury and the District's inability to tax commuters, claiming that the inability to tax commuters "is the substantial cause of the District's structural deficit" that forces it to overtax its residents and to reduce necessary public services. (Compl. ¶ 38.) But for the commuter tax ban, plaintiffs contend, the Council could "tax non-resident income earned within its borders [providing] hundreds of millions of dollars in needed revenue for the District [which would] ease the burden on overtaxed District residents [and] provide more and better services to residents and nonresidents." (*Id.* ¶ 53.)[36]

Finally, defendants challenge the redressibility of plaintiffs' injury, pointing to the fact that, in the event that the Court were to strike down the Prohibition, relief would be obtained only if the Council were to enact a commuter tax

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they claim. *See Adams*, 90 F. Supp. 2d at 41 (presuming that District residents are entitled to representation in the House and concluding that denial of such a voice "plainly constitutes an 'injury in fact'"); *see also Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal. . ."); *Catholic Soc. Serv. v. Shalala*, 12 F.3d 1123, 1126 (D.C. Cir. 1994) (for the purposes of standing analysis, the Court assumes the validity of the substantive claim). The District and its Council clearly have standing in their own right, *see Wyoming v. Oklahoma*, 502 U.S. 437 (1992) (where the effect of an Oklahoma statute was to deprive Wyoming of severance tax revenues, Wyoming had standing), and in any event, because the individual plaintiffs have standing, the Court need not find an independent basis for institutional standing. *See Adams*, 90 F. Supp. 2d at 45 n.12.

[36] Defendants argue that only the United States is a proper defendant, and that the United States Department of Justice and the Attorney General should be dismissed. The contested defendants, however, are properly named when plaintiffs challenge a statute as unconstitutional. *See, e.g., Am. Library Ass'n v. Burr*, 956 F.2d 1178, 1197 (D.C. Cir. 1992); *Seegars v. Ashcroft*, 297 F. Supp. 2d 201, 203 (D.D.C. 2004).

and Congress were to abstain from exercising its veto power over such legislation, which, as defendants argue, would be highly unlikely given its consistently hostile response to such legislation.[37] The complaint disposes of the first concern, by including a Council declaration stating that if it could, "the Council would enact a law to reduce income tax rates on its overtaxed residents and impose a fair and reasonable income tax on non-residents." (Mot. at 31 (citing Compl. ¶¶ 44, 53-55).) And, although the Act entitles Congress to veto or repeal laws enacted by the Council, if the Court were to hold the Prohibition unconstitutional, its holding would prohibit Congress from exercising these powers on a commuter tax law passed by the Council. *See Adams*, 90 F. Supp. 2d at 42 (citing *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (the Court may "assume that the President and the congressional officials would then follow the law as the Court articulated it")). Moreover, the possibility that a coordinate branch might subsequently negate or undermine the Court's relief does not necessarily destroy standing. *See Swan v. Clinton*, 100 F.3d 973, 980-81 (D.C. Cir. 1996). Plaintiffs therefore have standing to bring their challenge.

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[37] Efforts to bring up the commuter tax issue have been met with vocal opposition. For example, when Senator Harkin reopened the idea in 1988, he received much criticism. Representative Hoyer responded that "[t]he chance of that happening... is zero." Tom Sherwood, *Commuter Tax Controversy Rekindled in D.C. Budget Meeting*, Washington Post, May 26, 1988, at B11. Discussing a proposed legislative amendment that would create a commuter tax, Representative Harris of Virginia stated that it was impossible for him "to be altruistic when it comes to the commuter tax question." *Commuter Tax: Hearings and Markup on H.R. 11303 & 10116 Before the House Subcommittee on the District of Columbia*, 95th Congress (1978). The issue was the source of such contention in debates surrounding potential District statehood in 1988 that District Delegate Fauntroy was forced to assure wavering supporters of statehood that, as a state, the District would not impose a commuter tax. *See* Tom Sherwood, *Commuter Taxation Controversy Rekindled in D.C. Budget Meeting*, Washington Post, May 26, 1988, at B11.

VII. POLITICAL QUESTION

The political question doctrine arises from two constitutional principles: the separation of powers among the three coordinate branches of government and the inherent limits on judicial capabilities. *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1378-79 (D.C. Cir. 1981) (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).[38] The doctrine prohibits a court from interfering in a political matter that is principally within the dominion of another branch of government. *See Spence*, 942 F. Supp. at 39.

The issue here is whether the Court can review plaintiffs' constitutional challenge to the Prohibition by applying manageable standards without usurping Congress' authority over the District. *See Baker*, 369 U.S. at 217. Defendants argue that because Congress' power over the District is "plenary in every respect," its decision to enjoin the imposition of a nonresident income tax is one for "legislative, not judicial, consideration." (Mot. at 12-13.) Moreover, because they contend that plaintiffs do not have the rights they claim, they argue that there are no appropriate standards to review plaintiffs' challenge. (*Id.* at 16.)

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[38] In *Baker*, the Supreme Court articulated six factors which guide the identification of a non justiciable political question: a "textually demonstrable constitutional commitment of the issue to a coordinate political department," a "lack of judicially discoverable and manageable standards for resolving it," the "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion," the "impossibility of a Court's undertaking independent resolution without expressing lack of respect due coordinate branches of government," an "unusual need for unquestioning adherence to a political decision already made," or the "potentiality of embarrassment from multifarious pronouncements by various departments on one question." 369 U.S. at 217. "The presence of any one of these factors is sufficient to render an issue nonjusticiable." *Spence v. Clinton*, 942 F. Supp. 32, 39 (D.D.C. 1996).

That Congress' power is "plenary" is, as even defendants admit (*see id.* at 14 n.5), insufficient to insulate a law from judicial review. *See, e.g., INS v. Chadha*, 462 U.S. 919, 940-41 (1983) ("The plenary authority of Congress over aliens ... is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power."); *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84 (1977) (quoting *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946) ("The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute.")). Congress can exercise its plenary power over the District only "so long as it does not contravene any provision of the Constitution of the United States." *Palmore v. United States*, 411 U.S. 389, 397 (1973); *Turner v. Dist. of Columbia Bd. of Elections & Ethics*, 77 F. Supp. 2d 25, 29-30 (D.D.C. 1999).

> Just as this Court may strike down as unconstitutional legislation enacted by Congress for the entire country, the Court is fully empowered to review legislation for the District of Columbia for constitutional infirmities.... Congress' plenary power to legislate for the District of Columbia in no way strips this Article III Court of its authority, and its duty, to consider claims of constitutional violations.

Marijuana Policy Project v. Dist. of Columbia Bd. of Elections and Ethics, 191 F. Supp. 2d 196, 205 (D.D.C.), *rev'd on other grounds*, 304 F.3d 82 (D.C. Cir. 2002).

As in *Marijuana Policy Project*, plaintiffs present a justiciable issue. That case involved a First Amendment challenge to Congress' refusal to allow the District to enact any law reducing marijuana penalties. *See* 304 F.3d at 83. The district court concluded that the government's

"suggestion that this Court should ignore the clear constitutional concerns raised by [the law] in deference to Congress' plenary power to *legislate* is wholly without merit." 191 F. Supp. 2d at 205. *See also Firemen's Ins. Co. of Washington, D.C. v. Washington*, 483 F.2d 1323, 1327 (D.C. Cir. 1973) (quoting *Thompson Co.*, 346 U.S. at 109) ("Congress may delegate to the District government that 'full legislative power, *subject of course to Constitutional limitations to which all lawmaking is subservient. . . .*'") (emphasis added).

Moreover, "[j]udicial standards under the Equal Protection Clause are well developed and familiar." *Baker*, 369 U.S. at 226. Plaintiffs have challenged the commuter tax provision of the Home Rule Act as unconstitutionally discriminatory, and this Court has the duty to presume that they have the right they claim and thus has the power to review the challenged legislation for constitutional infirmity. *See Norwalk CORE v. Norwalk Redev. Agency*, 395 F.2d 920, 929 (2d Cir. 1968) ("Plaintiffs here complain that they were denied the equal protection of the laws...and this, at least, is a justiciable claim."); *see also Adams*, 90 F. Supp. 2d at 40 (plaintiffs' voting rights claim is justiciable because it cannot be assumed "that plaintiffs cannot prove what they allege"). As recognized by defendants during argument on these motions, "if the question is [whether] the action of Congress here [is] prohibited by the Equal Protection Clause or the Uniformity Clause, that's a question of law that this Court can certainly decide." (February 17, 2004 hearing transcript ["Tr."] at 37.) Because that is indeed the very question that plaintiffs present, the political question doctrine does not bar their claim, and the Court has jurisdiction to consider plaintiffs' constitutional arguments.

CONSTITUTIONAL CLAIMS

VIII. PLAINTIFF'S LEGAL THEORY

Plaintiffs attack the Prohibition by arguing that it discriminates in favor of Congress' own constituents (particularly the residents of Maryland and Virginia) against unrepresented citizens (the residents of the District). Their attack is premised on two arguments: (1) the law, relating to state taxation schemes prohibits a legislature from imposing a tax that favors its constituents at the expense of nonconstituents, and (2) based on this principle, Congress' legislative action here must be invalidated. As discussed herein, these arguments are unpersuasive.

Before addressing the flaws in plaintiffs' arguments, it is necessary to explicate plaintiffs' legal theory and to discuss the authorities upon which they rely. Plaintiffs, citing a line of Supreme Court tax cases, contend that "in a representative government, the representatives are going to have an inherent bias in favor of their constituents" (Tr. at 70), and that "when a legislature discriminates against the unrepresented in favor of the represented" in enacting tax laws, such legislation is "simply illegitimate." (*Id.* at 31 ("[I]n our view, if you read the cases together, it appears to us that the Court is effectively laying down that principle. It is forbidden, whether we're invoking the Privileges and Immunities Clause or the Equal Protection Clause, the Court uses the same analysis.").) Thus, they claim that, at least in the area of taxation, a citizen who has "no voting representation in the halls of the legislature that did the discriminating" is entitled to have the Court "take a harder look" at the legislature's action (Tr. at 36), and if this standard is applied here, the commuter ban will not survive

because it deprives District residents of the right to equal treatment."[39]

In making this argument, plaintiffs rely on several Supreme Court cases that provide that if a state chooses to tax its residents' income, it may also tax earnings of nonresidents employed within its borders as long as the nonresident tax is "of like character, and not more onerous in its effect" than the tax imposed on residents. *Shaffer v. Carter*, 252 U.S. 37, 52 (1920). These cases strike down tax laws that impose a more onerous burden on nonresidents than residents based on "the federal right of a nonresident...to equal treatment." *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 572 (1949) (striking down an *ad valorem* tax against certain intangible property of nonresident corporations that was not imposed on resident corporations); *see also Lunding v. N.Y Tax Appeals Tribunal*, 522 U.S. 287, 310 (1998) (striking down a "facially inequitable and essentially unsubstantiated taxing scheme that denies only nonresidents a tax deduction for alimony payments"); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 878 (1985) (striking down a state statute imposing a substantially lower tax rate on domestic companies than out-of-state ones).

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[39] As argued by plaintiffs' counsel:

> Congress has an inherent bias in favor of its constituents .... And that's why Chief Justice Marshall said in *Loughborough* that the unrepresented District residents were protected by a right of equal treatment. It's why the Supreme Court said in *Austin v. New Hampshire* that Maine residents are protected by a right of equal treatment. It's why in case after case that we've cited, the Court said the right of the nonresident is the right to equal treatment.

(Tr. at 70.)

In particular, the cornerstone of plaintiffs' theory is Justice Brennan's concurrence (joined by Justice Harlan) in *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 533 (1959), and the Supreme Court's decision in *Austin v. New Hampshire*, 420 U.S. 656 (1975).[40] In *Allied Stores*, the Court upheld an Ohio taxing scheme *favoring* nonresidents of the state against an equal protection attack brought by Ohio residents. In reaching its conclusion, the majority observed that the "Equal Protection Clause ... imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation." *Id.* at 526. Applying this principle, the Court concluded that a state's desire to promote "the location within the State of needed and useful industries by exempting them" from taxes provided a rational basis for upholding Ohio's tax that discriminated against residents in favor of nonresidents. *Id.* at 528-29. Justices Brennan and Harlan concurred, explaining that the Ohio tax in *Allied Stores* was unlike the tax in *Wheeling*, for the latter burdened nonresidents as compared to residents solely because they are nonresidents, which "is outside the constitutional pale," whereas the *Allied Stores* tax *favored* nonresidents, thus presenting "no state action disruptive of the federal pattern." *Id.* at 533. In agreeing that the *Allied Stores* tax was proper, Justice Brennan opined that a rational basis for such a tax

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[40] Plaintiffs also rely on dicta from *Loughborough*, where Chief Justice Marshall observed:

> If it be said, that the principle of uniformity, established in the constitution, secures the district from oppression in the imposition of indirect taxes, it is not less true, that the principle of apportionment, also established in the constitution, secures the district from any oppressive exercise of the power to lay and collect direct taxes.

18 U.S. (5 Wheat) at 325.

> could, in fact, be found in the concept that is proper that those who are bound to a State by the tie of residence and accordingly more permanently receive its benefits are proper persons to bear the primary share of its costs. Accordingly, in this context, it is proper to say that any relief forthcoming must be obtained from the State Legislature.

Id. at 533.

This concurrence is cited by the Supreme Court in *Austin v. New Hampshire*, 420 U.S. 656 (1975), where the Court invalidated, under the Privileges and Immunities Clause, a New Hampshire commuter tax on the grounds that out-of-state residents who worked in New Hampshire paid taxes on income earned there, whereas New Hampshire residents did not. The Court applied a "substantially more rigorous" standard of review given the need for "heightened concern for the integrity of the Privileges and Immunities Clause" and concluded:

> The Privileges and Immunities Clause, by making noncitizenship or nonresidence an improper basis for locating a special burden, implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism. Since nonresidents are not represented in the taxing State's legislative halls, cf. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 532-533 (1959) (Brennan, J., concurring), judicial acquiescence in taxation schemes that burden them particularly would remit them to such redress as they could secure through their own State; but to prevent (retaliation) was

> one of the chief ends sought to be accomplished by the adoption of the Constitution.

Id. at 662 (citation omitted).

From these two cases, plaintiffs extrapolate a legal axiom: *Austin's* "rigorous standard of review" is applicable to the commuter tax ban, since it is the product of Congress' inherent bias in favor of its constituents and it deprives the District residents, who lack congressional representation, of equal treatment. (*See* Tr. at 74; *see also* Opp. at 5, 15 ("[W]hen a legislature discriminates -- in a matter of taxation -- in favor of its own constituents and against people who are represented, the court will scrutinize this discrimination closer.").)

The axiom that plaintiffs advance, however, simply cannot be derived from the case law they present. First, they misread the concurring opinion in *Allied Stores*. Although Justices Harlan and Brennan closed by commenting that "any relief forthcoming must be obtained from the State Legislature," 358 U.S. at 533, a fair reading of their opinion does not, as plaintiffs argue, lead to the conclusion that a tax law is subject to rigorous analysis if it is imposed by a legislature that does not include representatives of those who are taxed. (*See* Tr. at 15-16.) Instead, the concurrence concluded that in order to properly distinguish cases such as *Wheeling*, in which the state unconstitutionally discriminated against nonresidents, and *Allied Stores*, where the state constitutionally discriminated against its own residents, "the answer lies in remembering that our Constitution is an instrument of federalism." 358 U.S. at 532. Because it involved a state tax that operated *against* its own residents, *Allied Stores* "clearly presents no state action disruptive of the federal pattern," and, thus, there was "no reason to judge the state action mechanically by the same principles as state

efforts to favor residents." *Id.* at 533. According to the concurrence, "*Wheeling* applied the Equal Protection Clause," not to protect nonvoters of the taxing legislature, but "to give effect to its role to protect our federalism by denying Ohio the power constitutionally to discriminate in favor of its own residents." *Id.*[41]

Austin affirmed the conclusion that tax laws that unfairly burden nonresidents must be struck down to protect "the structural balance essential to the concept of federalism." *Austin*, 420 U.S. at 662. Even the *Austin* excerpt that plaintiffs cite illustrates this purpose:

> Since nonresidents are not represented in the taxing State's legislative halls, judicial acquiescence in taxation schemes that burden them particularly would remit them to such redress as they could secure through their own State; but to prevent (retaliation) was one of the chief ends sought to be accomplished by the adoption of the Constitution.

Id. (quotation and citation omitted). Thus, in *Austin*, the Court acted to preserve harmony among the states in order to maintain "our constitutional federalism," not to protect citizens unrepresented by the taxing legislature. *Id.*

Similarly, in *Metropolitan Life*, the Court struck down tax laws favoring residents in an effort to limit states' power exerted against "the residents of other state members of our federation." 470 U.S. at 878 (quoting *Allied Stores*,

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[41] Justice Brennan made clear that, in the area of state taxation, the Equal Protection Clause is "an instrument of federalism" and that it operates to "maintain this principle of federalism" in the same manner as the Commerce and Due Process Clauses operate to regulate commerce among the states. *Id.* at 532.

358 U.S. at 533). The discriminatory tax was unconstitutional there because the state had "erected barriers to foreign companies who wish to do interstate business in order to improve its domestic [companies'] ability to compete at home," *id.*, not, as plaintiffs claim, "to protect outsiders against the natural bias of a State's legislature in favor of its own constituents." (Opp. at 17.)

The tax cases upon which plaintiffs rely, therefore, cannot be read to establish a rule that a tax law based on lack of representation is discriminatory and therefore illegitimate. Unlike the cases cited by plaintiffs, the commuter tax ban does not implicate federalism concerns or involve the need to restrain the exercise of state power. Thus, the cases they cite are simply inapposite.

More importantly, even if such a legal theory could be deciphered from those cases, settled principles regarding the District render it inapplicable, for it has been firmly established (understandably to the chagrin of District residents) that the District does not enjoy a traditional form of representative government. Every court to consider the question has concluded that, by virtue of the Constitution, residents of the District do not have the right to vote for members of Congress. *See Adams*, 90 F. Supp. 2d at 54-55. The political powerlessness suffered by those who live in the District is a constitutionally mandated and therefore legally accepted consequence of residence in the nation's capital. *See United States v. Cohen*, 733 F.2d 128, 135 (D.C. Cir. 1984) (*en banc*); *Calloway v. Dist. of Columbia*, 216 F.3d 1, 7 (D.C. Cir. 2000). It is thus impossible to accept plaintiffs' premise that the Prohibition is subject to attack based on a lack of representation in Congress, given that this very lack of suffrage is constitutionally derived. Whatever abstract appeal plaintiffs' theory of representative taxation has, it is simply *not* the theory embodied in Article I of the Constitution.

The notion that District residents are represented by the whole of Congress also defeats plaintiffs' attempt to analogize the Prohibition to unconstitutionally discriminatory state tax laws. District residents are not unrepresented citizens of the taxing legislature as plaintiffs claim, instead, they have "adopted the whole body of Congress for [their] legitimate government." *Loughborough*, 18 U.S. (5 Wheat.) at 324. Residents of every state, as well as each of their congressional representatives, bear the same allegiance to the District as our nation's capital. *See Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 601 (1949) (the District is "the city, not of a state, not of a district, but of a nation"). Thus, because the Prohibition was passed by Congress in its capacity as the District's legislature, under the analysis adopted in *Allied Stores*, plaintiffs are precluded from attacking the taxing legislature's favoritism of nonresidents. *See* 358 U.S. at 529-30.

Moreover, if anything, plaintiffs' reference to *Loughborough* (*see supra* note 11) undercuts their position. As clearly established, although District residents have no right to congressional representation, the federal government may tax them. *Loughborough*, 18 U.S. (5 Wheat) at 325. This result is permissible because "[t]here is *no* constitutional provision which so limits the power of Congress that taxes can be imposed only upon those who have political representation." *Heald*, 259 U.S. at 124 (emphasis added). Although *Loughborough* restricts Congress to uniformity in the application of its *federal taxing power* over the District, *see* 18 U.S. (5 Wheat) at 325, this axiom is inapplicable to Congress as the District's local taxing legislature. *See Neild v. Dist. of Columbia*, 110 F.2d 246, 249-52 (D.C. Cir. 1940) (Congress has the "full power" to impose a gross receipts tax upon the privilege of engaging in business in the District without regard to principles of uniformity). Thus, the holding in *Loughborough* does not limit "the power of Congress, legislating as a local legislature for the District, to

levy taxes . . . ." *Gibbons v. Dist. of Columbia*, 116 U.S. 404, 407 (1886), and it cannot be read for the proposition that any tax passed by Congress has to treat District residents in the same manner as residents of the states.

Indeed, the fact that Congress functions as the District's local legislature highlights the illogic in plaintiffs' argument. *See Palmore*, 411 U.S. at 397 ("Congress may exercise within the District all legislative powers that the legislature of a State might exercise within the State . . . ."); *Tidewater Transfer*, 337 U.S. at 592 ("'Not only may statutes of Congress of otherwise nationwide application be applied to the District of Columbia, but Congress may also exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes.'") (citation omitted); *La Forest v. Bd. of Comm'rs*, 92 F.2d 547, 550 (D.C. Cir. 1937) (Congress has "combined powers of a general and a state government" over the District). As plaintiffs concede, states may decline to impose a nonresident income tax, and a state's decision against taxing commuters creates no constitutional problems. (*See* Opp. at 7-9; Tr. at 14.) Moreover, a state may legally refuse to grant taxing power to its municipalities, and a municipality with such power may nonetheless elect not to exercise it. Under plaintiffs' approach, however, Congress does not enjoy the same discretion as does a state or a municipality. Rather, according to plaintiffs, Congress *must* either allow the Council to tax nonresidents or do it itself, and even in the absence of the Home Rule Act, if Congress opts to tax District residents, its refusal to impose a tax on commuters would be subject to attack as unconstitutional discrimination. (Tr. at 18-19.)

That simply cannot be so. If Congress' powers over the District are indeed commensurate to a local legislature, Congress has the same prerogative to elect not to impose a commuter tax in the District that state and local legislatures

have in their own jurisdictions. In fact, because Congress acts both as local and federal legislature for the District, its legislative authority with respect to the District is much broader than that of a state. Congress has "sweeping and inclusive" powers over the District, *Neild*, 110 F.2d at 249, in "all cases where legislation is possible." *Palmore*, 411 U.S. at 407. When it legislates for the District, Congress exercises "complete legislative control as contrasted with the limited power of a state legislature, on the one hand, and as contrasted with the limited sovereignty which Congress exercises within the boundaries of the states, on the other." *Neild*, 110 F.2d at 250-51. This exceptional legislative posture even allows it to "exercise its powers as a local sovereign where it has preempted the states from exercising similar local powers." *Cohen*, 733 F.2d at 132 n.10. In fact, as plaintiffs admit, Congress' plenary power over the District gives it the authority to withhold from the Council the power to impose income taxes altogether. (*See* Tr. at 17-18.) It therefore cannot be that if Congress chooses to tax the income of District residents, there must also be a requirement that Congress impose a commuter tax where there is no similar mandate applicable to states or municipalities.

In short, Supreme Court jurisprudence *does not* support the principle that tax legislation is subject to constitutional attack if it disfavors those without representation. But even if such a principle could be advocated, it cannot be applied here. The political powerlessness of District residents -- a situation that courts have consistently upheld as constitutionally mandated -- cannot be converted into a basis for attacking Congress' failure to pass a commuter tax. The *sui generis* nature of the District and its residents, coupled with Congress' plenary power over them, creates an insurmountable wall to the application of plaintiffs' legal theory.

IX. EQUAL PROTECTION

Plaintiffs' equal protection analysis suffers from several fundamental flaws. First, plaintiffs cannot invoke equal protection principles, since District residents who work here are not similarly situated to out-of-state residents employed here. And even if they were, the Prohibition could not be invalidated under the heightened scrutiny test, but would easily pass muster under a rational basis analysis.

The Court recognizes that the constitutional safeguard of equal protection applies to protect District residents, as all citizens of the nation, from discrimination. *See Shapiro v. Thompson*, 394 U.S. 618, 641-42 (1969) (prohibition of the provision of welfare benefits to people residing in the District for less than a year creates an improper classification and denies them equal protection of the laws); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (segregation in District public schools because of race violates students' equal protection rights).[42] Principles of equal protection, however, require only that similarly situated people be treated similarly. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (equal protection mandates that "all persons similarly circumstanced shall be treated alike").

Plaintiffs insist that by enacting the Prohibition, "Congress has passed [a] law that makes the District different . . . . [T]hey have discriminated between residents and nonresidents, even though they may be sitting side-by-side at the same job, earning the same money here in the

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[42] The principles embodied in the Fourteenth Amendment's Equal Protection Clause are applied to acts of Congress in the District through the Due Process Clause of the Fifth Amendment. *See Bolling*, 347 U.S. at 499.

District." (Tr. at 7; *see also* Tr. at 16-17.) Because it permits a tax to be imposed upon residents, but has elected not to permit a tax of nonresidents, Congress is allegedly "discriminating between two groups of people as to whom it has the power to tax as a matter of its local powers." (Tr. at 14.)

Plaintiffs' analogy is faulty, for the residents of the District are treated under the Constitution as a distinct class that is not comparable to any other group of citizens. As consistently held by the Supreme Court, the District is constitutionally distinct from the states, *see, e.g., Palmore*, 411 U.S. at 397; *Tidewater Transfer*, 337 U.S. at 588; *Hepburn & Dundas v. Ellzey*, 6 U.S. (2 Cranch) 445, 452 (1805), and "[u]nlike either the States or Territories, the District is truly *sui generis* in our governmental structure." *Dist. of Columbia v. Carter*, 409 U.S. 418, 432 (1973). When Congress legislates for the District, therefore, "the differing treatment is the consequence not of legislative determinations but of constitutional distinctions [and the] Court is without authority to scrutinize those distinctions to determine whether they are irrational, compelling, or anything in between." *Adams*, 90 F. Supp. 2d at 68. Whether plaintiffs lay claim to membership in a class treated differently than "non-residents in general" (Tr. at 7), or in a class treated differently than "non-residents who engage in taxable transactions within the District" (*id.* at 17), the analysis is the same. Plaintiffs' attempt to invoke equal protection principles fails because "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940).

An *en banc* decision by the Court of Appeals for this Circuit has stated as much. *See Cohen*, 733 F.2d at 137 n.15. In *Cohen*, the Court held that procedures enacted by Congress for automatic commitment to mental institutions of

federal defendants acquitted in the District did not violate equal protection principles. *Id.* at 139. It upheld the law even though federal defendants in the states were treated differently. *Id.* The majority noted, however, that if Congress lacked the power to legislate commitment procedures for federal defendants nationwide, it would be legislating for the District as its local sovereign. *Id.* at 137 n.15. Under that scenario, the Court continued, defendants in the states would fall outside the scope of the exercise of Congress' local legislative powers, and thus "would not constitute a proper reference class for equal protection purposes." *Id.* As subjects of the District's local legislative powers, District residents' equal protection argument would be "utterly frivolous." *Id.*

Thus, *Cohen* establishes that "[i]ndividuals within and without the District of Columbia are not similarly situated with respect to congressional legislation enacted in Congress' role as local sovereign." *Cohen*, 733 F.2d at 142-144 (Mikva, J. concurring).[43] In other words, the Constitution gives Congress permission to single District residents out by granting it much broader powers over the District than it has over the states and their residents. *See Palmore*, 411 U.S. at 397-98. Indeed, by definition every law Congress passes as the District's local legislature treats District residents differently than the rest of the nation's citizens, but certainly, not every one of these laws violates

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[43] Although the majority disagreed with Justice Mikva's concurrence to some extent, this proposition stands. Justice Mikva's analysis included the notion that Congress' actions *vis-a-vis* the District "ought to be immune from equal protection attack" *only* "when a state legislature could . . . impose the same rule in its state that Congress has imposed in the District." *Id.* at 142. The majority found this assumption unsubstantiated and too limiting, responding that "the Constitution does not contain the principle that Congress cannot exercise its powers as a local sovereign where it has preempted the states from exercising similar local powers." *Id.* at 132 n.10.

the Equal Protection Clause. *See, e.g., Marijuana Policy Project*, 304 F.3d at 87; *Calloway*, 216 F.3d at 12.

In an attempt to salvage their equal protection claim, plaintiffs urge the Court to view this case as one "in which Congress has exercised its national power" in conjunction with its local legislative power, arguing that when it passed the Prohibition, Congress was "acting in both capacities." (Tr. at 10, 28.) They contend that if Congress had been acting purely as a local legislature, "there is absolutely no chance in the world [it] would have banned a tax on nonresident income," rather, it "would have done what every state in the Union does, which is tax all income earned" within its borders. (*Id.* at 11.) Plaintiffs claim that the imposition of taxes upon all income earned in a jurisdiction is a "universal principal of taxation," and conclude that "[b]y enacting the Prohibition, Congress *made the rule uniform* everywhere except in the District." (Opp. at 44 (emphasis added).) (*See also* Tr. at 19 ("Congress has put together a taxing scheme that departs from the norm everywhere else in the country . . . .").)

The Prohibition, however, was clearly enacted under the District Clause as part of a comprehensive package for the District. When Congress enacts laws applicable to the District under its plenary District Clause powers, it usually does so as the District's local legislature. *See Brown v. United States*, 742 F.2d 1498, 1502 (D.C. Cir. 1984) *(en banc)* ("Congress frequently enacts legislation applicable only to the District and . . . [a]bsent evidence of contrary congressional intent, such enactments should be treated as local law.").[44] And as discussed above, it is within a state's

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[44] That is not to say that every enactment will be considered "local" under all circumstances. For example, in *Thomas v. Barry*, 729 F.2d 1469, 1471 (D.C. Cir. 1984), this Circuit held that certain provisions of the Home Rule Act did not apply exclusively to the District of Columbia and consequently could provide the basis for the exercise of

prerogative to decide whether to impose a nonresident income tax -- a decision that would clearly not require federal powers. Similarly, when Congress makes the choice, it is a local one. *See Thomas*, 729 F.2d at 1471. Plaintiffs admit that Congress is not required to operate on behalf of the interests of the District when it acts as a local legislature (Tr. at 12), and that instead, Congress is ordinarily "presumed to legislate in the best interests of the District and its residents." (Opp. at 4.) Plaintiffs' equal protection challenge is therefore flawed, because Congress has not acted on this subject with respect to anyone else but District residents, and it is constitutionally permitted to treat them differently.[45]

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federal question jurisdiction. The provision at issue in *Thomas* applied "directly to the federal not the District government," because it involved the transfer of employees from the federal government to the District's newly formed one. *Id.* The Court determined that the provision at issue was not purely local because a "state or local statute [could not] direct the federal government to affect transfers or to abolish positions altering its structure in the manner [it] required." *Id.* (quoting *Key v. Doyle*, 434 U.S. 59, 68 n.13 (1977) (equating exclusively local provisions of the D.C. Code to laws "enacted by state and local governments having plenary power to legislate for the general welfare of their citizens")).

[45] Plaintiffs contend that Congress *could* regulate the states with regard to commuter taxes by "pass[ing] laws saying that states can't tax commuters." (Tr. at 10.) The truth of this statement is dubious, as "[i]n our system of government the States have . . . complete dominion over all persons, property, and business transactions within their borders . . . [and] [t]he rights of the several States to exercise the widest liberty with respect to the imposition of internal taxes . . . 'is an incident of sovereignty.'" *Shaffer*, 252 U.S. at 50-52 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 429 (1819)). It is undeniable, moreover, that Congress could not pass such a law under the District Clause. Even if Congress chose to exercise some other power to legislate for the states on the issue of commuter taxation, its unique legislative posture with respect to the District would allow it to deviate from the very rule it imposed upon the states, because "[n]othing

It cannot be the case, furthermore, that Congress "made the rule uniform," not only because Congress has not acted with respect to any jurisdiction beyond the District, but also because the rule is not uniform. Plaintiffs cite no authority to support their novel "universal principle of taxation." In fact, they concede that some states decline to impose a nonresident income tax. *(See* Opp. at 7-9.) Indeed, although state taxing authorities have the *right* to impose income tax obligations on nonresidents, *see Shaffer*, 252 U.S. at 50, there is no constitutional provision or federal statute that *requires* a taxing legislature to tax nonresident income.[46] As previously discussed, acting as the District's local legislature, Congress has the same prerogative as other taxing legislatures to decline to impose a commuter tax.

Moreover, even if every state chose to tax all income earned within its borders, the practice would not become a "rule" giving the District the right, or Congress the obligation, to do so. Instead, it would amount to a policy consensus among the states. Congress has the power to make different policy choices and depart from the practice of the states when enacting laws specific to the District, for "[t]here has never been any rule of law that Congress must treat people in the District of Columbia exactly the same as people

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prevents Congress from mistrusting and thus overriding the local authority of the states with regard to certain matters, while leaving its own local authority, in which it may have greater confidence, unimpaired." *Cohen*, 733 F.2d at 132 n.10.

[46] Maryland and Virginia do not impose taxes upon District residents who earn income within their borders. (*See* Maryland's Mot. to Dismiss at 6 n.8; *Amicus* Brief of Fairfax County, *et al.* at 4; Tr. at 7.) Although many of the jurisdictions that elect not to tax commuters either impose no income tax at all, or reach reciprocal agreements with other jurisdictions to mutually forego nonresident tax collection, those exceptions nonetheless undermine the "universality" of the practice and illustrate its optional nature.

are treated in the various states." *Cohen*, 733 F.2d at 141 (Wilkey, J., concurring). The Council, moreover, was created by Congress, exercises only those powers granted to it by Congress, and has no sovereignty or *right* to tax anyone. *See Thompson Co.*, 346 U.S. at 107 (although the District is a "separate political community," its "sovereign power [is] lodged in the Congress").[47]

Simply put, under the Constitution and the Home Rule Act, the District and its residents are the subjects of Congress' unique powers, exercised to address the unique circumstances of our nation's capital. Neither state practices nor the rest of the nation's citizens constitute a proper reference class for purposes of challenging the Prohibition. Moreover, even assuming *arguendo* that plaintiffs are entitled to invoke the protections of Equal Protection Clause to challenge the Prohibition, they are not entitled to the application of a heightened level of scrutiny, and thus, the law must be upheld under the less exacting rational basis test.

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[47] Perhaps the more appropriate analogy in this circumstance is between a state and its municipality. As a municipal subordinate of Congress, the District's taxing rights are only as broad as the sovereign grants. *See, e.g., City of New York v. State*, 730 N.E.2d 920, 926 (N.Y. 2000) ("Although the State appropriately authorized the City to implement the commuter tax, it never ceded its taxing authority to the City."); *Griffen v. Anne Arundel Co.*, 333 A.2d 612, 619 (Md. Ct. Spec. App.), *cert. denied*, 275 Md. 749 (1975) ("Since the power to tax is an inherent attribute of sovereignty and since a County is only an agency or subdivision of the State, it is fundamental that the power of a county [or a municipality] to tax is not inherent but is a delegated power and exists only when and to the extent granted by the State."). Maryland has declined to grant taxing power to Baltimore, for example, a legislative decision that plaintiffs do not claim is unconstitutional. (Maryland's Mot. to Dismiss at 5 n.8; Tr. at 19-21.)

A. Standard of Review

1. Heightened Scrutiny

"Most laws will survive equal protection challenge if they bear a rational relationship to a legitimate governmental purpose .... More searching scrutiny is reserved for laws that either burden a suspect class or impinge upon a fundamental interest." *Calloway*, 216 F.3d at 6 (citing *Vacco v. Quill*, 521 U.S. 793, 799 (1997)). Because the Court finds neither, heightened scrutiny of plaintiffs' equal protection claim is inappropriate.

Plaintiffs base their argument that the Prohibition "must be subjected to heightened scrutiny" upon the same tax cases they invoke to allege the illegitimacy of a discriminatory tax based on lack of representation. (*See* Opp. at 18.) They admit, however, that heightened scrutiny is not referenced in any of those decisions applying an equal protection analysis. (Tr. at 30-31.)

Instead, the Court conducted a rational basis inquiry with respect to these tax cases, concluding that the "promotion of domestic business by discriminating against nonresident competitors is not a legitimate state purpose." *Metro. Life*, 470 U.S. at 882.[48] Plaintiffs insist,

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[48] *See also Williams v. Vermont*, 472 U.S. 14, 23 (1985) (striking down a tax because there was "no legitimate purpose ... furthered by [the state's] discriminatory exemption" for state residents); *WHYY, Inc. v. Glassboro*, 393 U.S. 117, 120 (1968) (striking down a tax discriminating against nonresidents because the state could advance no "distinction between [foreign] and domestic [companies] which would justify the inequality of treatment"); *Allied Stores*, 358 U.S. at 527 (applying the standard that discrimination in taxation must have "a rational basis and may not [be] a classification that is palpably arbitrary"); *Wheeling*, 337 U.S. at 572 (striking down the tax because "the inequality is not because of the slightest difference in Ohio's relation

nonetheless, that some heightened level of scrutiny is appropriate because the remainder of the tax cases they cite implement a "more rigorous" standard of review. (Opp. at 18 (citing *Austin*, 420 U.S. at 663).) These decisions, including *Austin*, were decided on the basis of the Privileges and Immunities Clause, and at most, require a "substantial reason for the difference in treatment." *Lunding*, 522 U.S. at 298. To the extent that the reasoning of these decisions is applicable to an equal protection analysis, none of them establish that strict scrutiny of plaintiffs' equal protection claim is appropriate.

Nor have plaintiffs established the infringement of a fundamental interest sufficient to warrant a heightened level of scrutiny. As discussed above, they have failed to establish a *per se* rule of illegitimacy with respect to a discriminatory tax based on a lack of representation. Plaintiffs cannot argue that whenever "a legislature discriminates -- in a matter of taxation -- in favor of its own constituents and against people who are not represented, the Courts will scrutinize this discrimination closely." (Opp. at 5.) Furthermore, as the Court has established, the imposition of taxes upon all income earned in a jurisdiction is not a "universal principle of taxation" that can be used to argue for the existence of a fundamental right. Thus, plaintiffs have failed to present any "fundamental interest" that Congress has breached through its decision to deprive the District of the right to tax commuters.

Plaintiffs' argument that District residents constitute a suspect class is likewise unavailing. "Suspect class" status is reserved for classifications that "are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective." *Plyler v.*

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to the decisive transaction, but solely because of the[ir] different residen[ce]").

Doe, 457 U.S. 202, 216 n.14 (1982). District residents are subject to different treatment when Congress legislates pursuant to the District Clause, not because of a legislative determination, but as a consequence of constitutional distinctions. *See Adams*, 90 F. Supp. 2d at 68. It would be illogical, therefore, to determine that the classification at issue is suspect, because it "is not the product of presidential, congressional, or state action ... [but] is one drawn by the Constitution itself." *Id.* at 66. "[I]n a sense the Constitution itself establishes the rationality of the ... classification, by providing a separate federal power which reaches only [District residents]." *Cohen*, 733 F.2d at 139; cf. *United States v. Antelope*, 430 U.S. 641, 649 n.11 (1977) ("[T]he Constitution itself provides support for legislation directed specifically at the Indian Tribes .... [T]he Constitution therefore singles Indians out as a proper subject for separate legislation.").

Despite the holdings in *Adams* and *Cohen*, plaintiffs insist that there is a "fundamental difference" between this case and others, because when enacting the Prohibition, "there was a direct conflict of interest between the constituents [of Congress] who were represented and the citizens in the District who are not represented." (Tr. at 32.) This argument simply amounts to the contention that District residents' lack of congressional representation requires the Court to consider their classification suspect. Indeed, plaintiffs admit that if the District had voting representation in Congress, and yet Congress still declined to pass a commuter tax for the District, they would have a "harder case." (Tr. at 33.) Unfortunately for plaintiffs, the *en banc* Court in *Cohen* flatly rejected the argument that District residents warrant classification as a suspect class because of their inability to vote for a congressional representative: "[E]ven if one accepts the thesis that the class in question is residents of the District of Columbia, the mere lack of the ballot does not establish political powerlessness, or, if it

does, political powerlessness alone is not enough for 'suspect class' status." *Cohen*, 733 F.2d at 135.

The Court of Appeals recently affirmed *Cohen's* holding in *Calloway*, where it applied rational basis review to Congress' discriminatory treatment of District residents with respect to an attorneys' fees provision of the federal Individuals with Disabilities Education Act. 216 F.3d at 6-7. Dismissing the request for a heightened level of scrutiny, the Court stated that it "may not now depart from the *en banc* court's conclusion that D.C. residents do not comprise a suspect class for equal protection purposes." *Id.* at 7. Nor does this Court have the ability to depart from these holdings and is thus constrained to conclude that District residents do not constitute a suspect class. With no basis to justify heightened scrutiny of plaintiffs' equal protection claim, the rational basis analysis is the appropriate framework to be applied.

2. Rational Basis

Pursuant to this test, the Court must decide whether "there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 320 (1993). The rational basis inquiry is "highly deferential," *Calloway*, 216 F.3d at 9, and is "not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Heller*, 509 U.S. at 319. Any plausible reason for Congress' action is sufficient for purposes of a rational basis analysis, *see United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980), and absent some reason to infer irrationality, the statute will survive review.

See Calloway, 216 F.3d at 9 (citing FCC *v. Beech Communications*, 508 U.S. 307, 314 (1993)).[49]

Defendants have offered several viable reasons for Congress' incorporation of the Prohibition into the Home Rule Act. The Act itself was crafted by Congress to strike a careful compromise between its unique constitutional responsibility for the nation's capital and the District's desire for self-government. It limited the District's ability to fully maximize its earning potential in many ways, one of which is its incapacity to tax commuters, but offset those provisions with yearly federal payments to the District. It is rational to conclude that the Prohibition is an attempt to ensure that all of the nation's taxpayers make a fair financial contribution to the nation's capital through these federal appropriations, rather than disproportionately burdening the states that surround the District for its support. *See Statement by the President Upon Signing the Bill into Law*, 9 Weekly Comp. Pres. Doc. 1483 (Dec. 24, 1973) ("As the principal employer in Washington, D.C., the Federal Government recognizes its responsibility to pay its fair share of the operations of the District government.").

Defendants and the intervenors also cite the promotion of business in the District as a rational basis for the Prohibition. "Economic development [is a reason] Congress might well have had in mind when it decided not to let the [District] impose a tax on nonresidents .... [I]f

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[49] The Court is mindful of the fact that the privileges and immunities cases plaintiffs cite require the taxing legislature to demonstrate a "substantial reason" for the discriminatory tax. *See, e.g., Lunding*, 522 U.S. at 298. Although, for reasons explained *infra* at Section IV, the Court does not believe that those cases provide an appropriate framework for resolving this case, even if that standard could be invoked, defendants have provided sufficient justification to sustain the Prohibition.

Virginians have to pay high taxes to work on this side of the river, they might as well stay on the other side and pocket the difference." (Tr. at 66-67.) This purpose is entirely legitimate and has consistently been found to provide a rational basis. Indeed, "it has repeatedly been held and appears to be entirely settled that a statute which encourages the location within the State of needed and useful industries by exempting them ... from its taxes is not arbitrary and does not violate the Equal Protection Clause." *Allied Stores*, 358 U.S. at 528. When Congress, as the District's local legislature, attempts to encourage the development of business within its borders by exempting nonresidents from income tax obligations, its conduct is equivalent to Ohio's efforts to benefit its economy by allowing nonresidents to purchase and operate warehouses free from taxes in *Allied Stores*. *Id.* at 529. Both are legitimate.[50] In fact, Congress has an especially unique motivation to attract employees to this city, as the nation's capital, and conceivably would want to encourage federal government service through tax exemptions.

A rational basis can also be found "in the concept that it is proper that those who are bound to a State by the tie of residence and accordingly more permanently receive its benefits are proper persons to bear the primary share of its costs." *Allied Stores*, 358 U.S. at 533 (Brennan, J.,

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[50] Plaintiffs' attempt to defeat any rational basis on the basis of the tax cases they cite cannot succeed, even though the tax laws in those cases (except in *Allied Stores*) were found to have no rational basis. In those cases, the "promotion of domestic business by discriminating *against* nonresident competitors," as opposed to *for* them, was deemed illegitimate. *Metro Life*, 470 U.S. at 882 (emphasis added). Moreover, as discussed in *Allied Stores*, the distinction made here does not rest upon the "different residence of the owner" but upon a "state of facts that reasonably can be conceived to constitute a distinction, or difference in ... policy, which the State is not prohibited from separately classifying for purposes of taxation..... *Allied Stores*, 358 U.S. at 530.

concurring). As intervenors point out, District "residents receive the benefit of the income tax that's being raised to a degree that cannot possibly be shared by nonresidents" by enjoying "an array of services that are not used by the Virginians who come here or those coming here from Maryland." (Tr. at 60, 65.) Congress could well have believed that the "businesses [in the District] are net tax producers," while the residents "are net tax consumers." (Tr. at 65.) The Prohibition thus not only promotes tax revenue generators within District borders, but it reasonably places the primary fiscal responsibility for services upon those who enjoy them.

Plaintiffs allege that Congress chose to forbid the District from taxing nonresident income in an effort to benefit their own constituents at the expense of the District, attempting to conjure suspicions of animus -- and negate any conceived rational basis -- by citing various comments in opposition to a commuter tax by members of Congress. (*See, e.g.* Opp. at 43 (quoting *Commuter Tax: Hearings and Markup on H.R. 11303 & 10116 Before the Subcomm. on Fiscal Affairs and the House Comm. on the District of Columbia*, 95th Cong. 190 (1978) (statement of Rep. Harris) ("[I]t is impossible to be altruistic when it comes to the commuter tax question.")).) The Court, however, cannot invalidate legislation based on statements by individual legislators during debate "which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." *United States v. O'Brien*, 391 U.S. 367, 384 (1968).

Moreover, despite the arguments in the *amicus* brief filed on behalf of plaintiffs' position, "it has long been settled that a classification, *though discriminatory*, is not arbitrary nor violative of the Equal Protection Clause ... if any state of facts reasonably can be conceived that would sustain it." *Allied Stores*, at 528 (emphasis added). Plaintiffs themselves

concede that if the Council had the power to tax nonresidents but chose not to implement it, "[t]here would be a discrimination" that would nonetheless withstand constitutional challenge for the reasons articulated in *Allied Stores*. (Tr. at 75.) Therefore, although *amici* for plaintiffs present a compelling argument that the District is treated inconsistently and unfairly by the Prohibition, this discrimination does not violate the Equal Protection Clause. Defendants offer a host of possible rational reasons for this legislation, and thus, the Court cannot conclude that Congress has acted improperly or irrationally in violation of the Equal Protection Clause.

X. THE UNIFORMITY CLAUSE

Plaintiffs fare no better under the Uniformity Clause, which provides that "Duties, Imposts and Excises [imposed by Congress] shall be uniform throughout the United States." U.S. Const., Art I, § 8, cl. 1. Although the Prohibition amounts to neither a direct nor indirect tax *imposed* by Congress, plaintiffs' Uniformity Clause claim rests on the proposition that a violation can result from legislation exempting a particular geographic region from taxation or forbidding a specific region from imposing a tax. (*See* Opp. at 7, 48 ("[Congress has] discriminat[ed] against a single geographic region -- the District -- and treat[ed] it differently from the States and territories." (citing *United States v. Ptasynski*, 462 U.S. 74, 85 (1983) (when a tax exemption is framed in geographic terms, it should be examined to see if there is actual geographic discrimination)).) Thus, their Uniformity Clause argument is grounded upon their claim that by enacting the Prohibition, Congress "made the rule" -- that income is taxed where it is earned regardless of the residence of the earner -- "uniform" everywhere but in the

District.[51] They invoke *Loughborough* to support their contention that "[f]or people not represented ... their protection comes from the principle of equality, that they have to be treated ... the same as the people who do have the right to vote ... in taxation matters." (Tr. at 24.)

To the extent that such an analysis is appropriate, the principles of uniformity advanced in *Loughborough* and ensured by the Uniformity Clause simply do not apply to this case. That Clause limits Congress' powers of commerce and taxation, *see Ptasynski*, 462 U.S. at 81, and is not a limitation upon Congress when it enacts laws applicable specifically to the District under the District Clause. For, as recognized by the D.C. Circuit:

> It has long been established that Congress may constitutionally impose excises in the territories which it governs directly, without making such excises generally applicable to the country at large. Many District of Columbia taxes are excises and have been upheld. The uniformity requirement was not mentioned in any of these District of Columbia cases, but the omission seems to indicate that it was deemed to be a settled question. The courts sustained the taxes without referring to this constitutional restriction.

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[51] Plaintiffs allege that "Congress may not impose income taxes at one rate for one state or area, and at a different rate for another state or area." (Compl. ¶ 59.) They draw an analogy to a hypothetical version of the recent Internet Tax Freedom Act, 47 U.S.C. § 151 (2002), to explain their Uniformity Clause argument. That legislation forbids any state from imposing taxes upon the internet. "Had Congress instead passed a law forbidding only the State of Rhode Island from taxing the internet, the law would not be uniform [and] would certainly be unconstitutional." (Opp. at 46.)

Mercury Press, Inc. v. Dist. of Columbia, 173 F.2d 636, 637 (D.C. Cir. 1948).

As with their attempts to apply equal protection principles, plaintiffs' uniformity argument is premised on the faulty assumption that the Prohibition represents legislation of a national character. (*See*Tr. at 28.) As discussed above, *Loughborough* only restricts Congress to uniformity in the application of its *federal* taxing power over the District, *see* 18 U.S. (5 Wheat) at 317, and cannot be used to support the claim that the District is protected by a right of equal treatment against congressional tax laws passed pursuant to the District Clause. Indeed, plaintiffs admit that if Congress had legislated solely "as a local legislature for the District, to levy taxes for District purposes only, in like manner as the legislature of a State may tax the people of a State for State purposes only," then the Uniformity Clause would not apply. (Tr. at 27-28 (quoting *Gibbons*, 116 U.S. at 407, and citing as an example of a permissible local tax a congressional sales tax imposed "only in the District of Columbia to raise revenues for support of the District government").)

Plaintiffs, nonetheless, cite *Binns v. United States*, 194 U.S. 486, 491 (1904), in an effort to convince the Court that the Prohibition can be considered a "local tax" for Uniformity Clause purposes *only* if it has the "purpose" of providing revenue for the District. (*See* Opp. at 48.) In *Binns*, the application of Congress' taxing power discriminatorily applied to Alaska was upheld because the purpose of the special tax was to raise revenue for use in Alaska and the total revenues it earned did not exceed the federal expenses there. *Id.* at 494-95. The Prohibition clearly does not pose the problem sought to be prevented by the Court in *Binns*, because the federal government is not overburdening a particular region with a tax "for the benefit of the nation as distinguished from that necessary for the support" of the District. *Id.* at 496. *Binns is* also inapposite

because Alaska was taxed under Congress' general taxing power, not its District Clause powers.

Instead, as previously discussed, whether a provision of the Home Rule Act represents national or local legislation is determined, not by its purpose or effect, but rather, by the power invoked. *See Key*, 434 U.S. at 68 n.13; *Thomas*, 729 F.2d at 1471. As local legislation passed pursuant to the District Clause, there is no basis under the Uniformity Clause to validate the Prohibition.

And even if the Uniformity Clause were applicable, Congress enacted the Home Rule Act and its individual provisions regarding taxation in order to address a geographically-isolated situation, which is entirely permissible despite the overarching goal of uniformity. *See Ptasynski*, 462 U.S. at 83-84 ("[T]he uniformity provision does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems.") (quoting *Region Rail Reorganization Act Cases*, 419 U.S. 102, 161 (1974)). The Prohibition here is therefore constitutionally permissible, as the Constitution itself creates the District as a geographically-isolated situation appropriate for selective legislation.

XI. THE PRIVILEGES AND IMMUNITIES CLAUSE

Plaintiffs collapse their privileges and immunities claim with their equal protection claim because, as noted above, almost half of the tax cases they rely on to construct their theory were decided under the Privileges and Immunities Clause. These cases require a "substantial reason for the difference in treatment" where nonresidents are subject to a more burdensome tax than residents of the taxing state, because of the protections afforded all state citizens by

the Privileges and Immunities Clause in Article IV of the Constitution. *See Lunding*, 522 U.S. at 298.[52] Article IV's privileges and immunities, however, provides "a limitation upon the states only and in no way affects the powers of Congress over the District of Columbia," *Neild*, 110 F.2d at 249 n.3; *see also Duehay v. Acacia Mut. Life Ins. Co.*, 105 F.2d 768, 775 (D.C. Cir. 1939), and thus, the application of the principles contained in these cases to the instant challenge is highly questionable.

It is likewise unclear whether plaintiffs can import the privileges and immunities principles of the Fourteenth Amendment to the District. Although equal protection principles are incorporated into the Fifth Amendment and are thus applicable within the District, *see Bolling*, 347 U.S. at 500, it has not been established whether the Fourteenth Amendment's Privileges and Immunities Clause would also apply. *See Adams*, 90 F. Supp. 2d at 68 & n.66.

But even if plaintiffs can apply the privileges and immunities of citizenship to Congress' enactment of the Prohibition, there is no right of national citizenship abridged by this legislation. "Privileges and immunities of citizens of the United States are only such as arise out of the nature and essential character of the National Government, or are specifically granted or secured to all citizens or persons by the Constitution of the United States." *Jones v. Helms*, 452 U.S. 412, 418 n.12 (1981) (quotation and citation omitted). District residents have no right to demand that commuters be taxed, just as the District Council has no right to tax them. Insofar as plaintiffs' complaint is grounded upon District residents' denial of the vote, the *Adams* decision makes clear

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[52] The other decisions plaintiffs cite that apply a Privileges and Immunities Clause analysis are *Austin v. New Hampshire*, 420 U.S. 656, 666 (1975); *Travis v.* Yale Mfg. Co., 252 U.S. 60, 79 (1920); and *Ward v. Maryland*, 79 U.S. (12 Wall) 418, 430 (1871).

that this approach cannot succeed. *See Adams*, 90 F. Supp. 2d at 70 ("[D]enial of the vote to [District] residents does not abridge their national privileges or immunities . . . [because it] is not the consequence of the addition of any extra-constitutional qualification on voting .... Rather, it is the result of applying precisely those qualifications contained in the Constitution itself."). Therefore, plaintiffs' privileges and immunities claim must also be rejected.

CONCLUSION

While the Court is sympathetic to plaintiffs' arguments and fully appreciates the manifest inequity created by the District's inability to tax commuters, the Court lacks the power to grant the remedy that plaintiffs seek. The Constitution and binding Supreme Court and Circuit precedent establish Congress' plenary power over the District and its residents and their unique status within our constitutional framework. Despite its apparent unfairness, the legislative scheme at issue here is not unconstitutional, and therefore, the motions to dismiss must be granted.

/s/Ellen Segal Huvelle
ELLEN SEGAL HUVELLE
United States District Judge

DATE: March 11, 2004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES M. BANNER, Jr., et al,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 03-1587 (E**
UNITED STATES OF AMERICA, et al.,	)	
Defendants.	)	

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that the Motions to Dismiss the Complaint filed by the Federal Defendants [7-1], the Commonwealth of Virginia [10-1], and the State of Maryland [8-1] are **GRANTED**; and it is

FURTHER ORDERED that Plaintiffs' Complaint is DISMISSED WITH PREJUDICE.

THIS IS A FINAL APPEALABLE ORDER.

s/
ELLEN SEGAL HUVELLE
United States District Judge

DATE: March 11, 2004

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CITIZENS OF THE DISTRICT OF COLUMBIA, *namely:*

James M. Banner, Jr., 1847 Ontario Place, N.W., Wash., D.C. 20009,
Henry J. Brothers, II, 115 4th St., N.E., Wash., D.C. 20002,
Marilyn Tyler Brown, 3050 Chestnut St., N.W., Wash., D.C. 20015,
Audrey C. Buckner, 4306 Wheeler Rd., S.E., Wash., D.C. 20032
Jeffrey Haggray, 3547 16th St., N.W., Wash., D.C. 20010,
Wilbur F. Jackson, 1711 Shepherd St., N.W., Wash., D.C. 20011,
Michael Maccoby, 4825 Linnean Ave., N.W., Wash., D.C. 20008,
Albrette "Gigi" Ransom, 219 Webster St., N.E., Apt. 2, Wash., D.C. 20011
Johnnie Scott Rice, 4262 Mass., Ave., S.E., Wash., D.C. 20019,
Brenda Lee Richardson, 3008 24th Pl., S.E., Wash., D.C. 20020,
Alice M. Rivlin, 2838 Chesterfield Pl., N.W., Wash., D.C. 20009,
Pete Ross, 1712 Surrey Ln., N.W., Wash., D.C. 20007,
Kaye E. Savage, 18 Ingraham St., N.W., Wash., D.C. 20011,
Iris J. Toyer, 2211 S St., S.E., Wash., D.C. 20020,
Melody Regina Webb, 612 G St., S.W., Wash., D.C. 20024

Bathrus B. Williams, 2500 Virginia Ave., N.W., Apt. 1403, Wash., D.C. 20037,
Roger Wilkins, 1253 4th St. S.W., Wash., D.C., 20024
Malcolm L. Wiseman, Jr, 1228 Crittenden St., N.W., Wash. D.C. 20011,

THE DISTRICT OF COLUMBIA,
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004,

ANTHONY A. WILLIAMS, in his official capacity as Mayor of the District of Columbia
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004,

THE COUNCIL OF THE DISTRICT OF COLUMBIA, each in his or her official capacity as a Councilmember and each located at 1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004, namely

LINDA W. CROPP, Chairman,
SANDY ALLEN,
SHARON AMBROSE,
HAROLD BRAZIL,
DAVID A. CATANIA,
KEVIN P. CHAVOUS,
JACK EVANS,
ADRIAN FENTY,
JIM GRAHAM,
PHIL MENDELSON,
VINCENT B. ORANGE, Sr.,
KATHLEEN PATTERSON,
CAROL SCHWARTZ,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
United States Attorney for the District of Columbia
555 Fourth Street, N.W.
Washington, D.C. 20005

THE UNITED STATES DEPARTMENT OF JUSTICE; and JOHN ASHCROFT, in his official capacity as
Attorney General of the United States
United States Department of Justice
Office of the Attorney General
10th Street and Constitution Avenue, N.W.
Washington, D.C. 20530,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

SUMMARY OF THIS ACTION

1. The Plaintiffs ask this Court to declare unconstitutional a statute enacted by the United States Congress that prohibits the District from taxing income that is earned within its borders by non-residents. *See* D.C. Home Rule Act, Title VI § 602(a)(5), P.L. 93-198, 93rd Cong., S.1435, 87 Stat. 774, *codified at* D.C. Official Code § 1-206.02(a)(5) (2001) (referred to hereinafter as "the Prohibition"). Plaintiffs are residents and taxpayers of the District of Columbia who, like District residents generally, pay substantially above-average tax rates as a result of the Prohibition. The District of Columbia, Mayor Anthony Williams, and the Council of the District of Columbia join the action as plaintiffs.

2. The Prohibition departs from the universal rule, applicable everywhere else in the United States and in most of the world, that the jurisdiction where income is earned has the primary right to tax it. This rule is followed by Congress under the Internal Revenue Code with regard to the imposition of federal income taxes in this country. The rule is also followed by each of the forty-one states that has adopted an income tax. Each state with an income tax applies the tax to all income earned within the state's borders – whether earned by residents or non-residents (unless it chooses to enter into a "reciprocity agreement" with another state). Each jurisdiction avoids double taxation of its own residents by granting them a credit against its own income tax revenues for any income taxes paid to other jurisdictions.

3. The Prohibition severely damages the District's fiscal system, leaving it with a "structural imbalance." The General Accounting Office of the United States ("GAO") concluded in a report released June 5, 2003, that given the Prohibition, "even if the District's services were managed efficiently, the District would have to impose above average tax burdens just to provide an average level of services." "District of Columbia, Structural Imbalance and Management Issues," GAO-03-666 (May 2003), at 8. The GAO estimated the District's structural imbalance between $470 million and $1.1 billion annually. *Id.* at 8, 12. The GAO's estimate of the size of the structural deficit took into account all federal grants and aid given to the District.

4. Non-residents who work in the District impose substantial costs on the District. The Prohibition exempts these non-residents from any obligation to pay their fair share of these costs through income taxation. The burden of paying these costs falls on Plaintiffs and the other residents of the District.

5. As a result of the structural imbalance, residents of the District are, by most measures, subjected to higher state and local (i.e., non-federal) taxes than the residents of any state in the United States.

6. The Prohibition discriminates against the District primarily in favor of Maryland and Virginia. Moreover, the Prohibition effectively shifts the right to tax income earned in the District away from the District to states all over the country. Many law firms, accounting firms, and other partnerships with offices in the District also have offices in New York, California, and other states. The partners of these firms who live and work in the District pay income taxes to New York, California, and other states on income earned in those states. Because of the Prohibition, however, the partners who live and work in partnership offices in New York, California, and the other states pay no income taxes to the District on the income earned in the District.

7. Over 70 percent of all personal income earned in the District is earned by non-residents. The total amount of income earned in the District by non-residents exceeds $30 billion each year. Thus, the Prohibition takes over $30 billion each year in taxable income that would be taxable by the District under the universal "income-source" rule, and instead gives it to Virginia, Maryland, and other states to tax. Depending on the tax rate that the District might impose on this non-resident income earned within its borders, the Prohibition costs the District every year from approximately $530 million (assuming a 2% rate) to approximately $1.4 billion (assuming imposition of the same rates currently applied to District residents). This lost revenue is a substantial cause of the District's structural deficit and requires District residents to pay higher taxes than they otherwise would pay. Through those higher taxes, District

residents pay not only for their own share of District services, but also for the non-residents' share of District services.

8. Congress has singled out the District as the sole jurisdiction where it precludes a tax on non-resident income. In doing so, Congress has discriminated against the District and its residents, who lack voting representation in Congress, in favor of residents of the several states, particularly Maryland and Virginia, who have such voting representation in Congress.

9. Our Nation's founders had a profound distrust of any taxation without representation – a distrust they expressly set forth in the Declaration of Independence. The Supreme Court has permitted taxation of citizens who are unrepresented in the taxing legislature, but only when the unrepresented citizens are taxed in a manner equal to citizens who are represented in the taxing legislature.

10. In *Loughborough v. Blake*, 18 U.S. 317 (1820), the Supreme Court sustained a tax imposed by Congress on the District, even though the District was not represented in Congress. The Court recognized the "great principle which was asserted in our revolution, that representation is inseparable from taxation." However, the Court permitted Congress to tax the District's unrepresented residents because they were to be taxed in the same way as the residents of the states who were represented. Thus, the Court said, "the principle of uniformity established in the Constitution secures the District from oppression in the imposition of indirect taxes." *Id.*, at 325.

11. Here, the Prohibition discriminates against the unrepresented residents of the District. It treats them differently from the residents of all other taxing jurisdictions. It leaves the District with a structural deficit and subjects its residents to unequal and oppressive taxes. The Prohibition

violates the Uniformity Clause, the Privileges and Immunities Clause, and the Equal Protection Clause of the U.S. Constitution, and deprives the residents of the District of property without due process of law. The Prohibition is therefore unconstitutional.

JURISDICTION AND VENUE

12. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 or 28 U.S.C. § 1343; this action arises under the Constitution and laws of the United States.

13. There is an "actual controversy" between Plaintiffs and the United States within the meaning of the Declaratory Judgment Act, 28 U.S.C. § 2201, empowering this Court to "declare the rights and other legal relations of [these] interested part[ies] seeking such declaration."

14. Venue is proper in this district under 28 U.S.C. §§ 1391(b) and (e), on the alternative grounds that (a) the Defendant, the United States of America, resides in the District of Columbia; (b) "a substantial part of the events or omissions giving rise to the claim[s] occurred" in the District of Columbia; and (c) each of the Plaintiffs resides in the District of Columbia.

PARTIES

15. Each individual plaintiff is a private citizen and taxpayer suing in his or her individual capacity, is a competent adult over the age of eighteen years of age, is a citizen of the United States, is a permanent resident and domiciliary of the District of Columbia, is a qualified voter in the District of Columbia, and pays personal income and other taxes to the United States and to the District of Columbia. No individual plaintiff has a voting representative in the United States Congress. The individual plaintiffs with such characteristics are:

(a) James M. Banner, Jr., residing at 1847 Ontario Place, N.W., Wash., D.C 20009;

(b) Henry J. Brothers, II, residing at 115 4th Street, N.E., Wash., D.C. 20002;

(c) Marilyn Tyler Brown, residing at 3050 Chestnut St., N.W., Wash., D.C. 20015;

(d) Audrey C. Buckner, residing at 4306 Wheeler Rd., S.E., Wash., D.C. 20032;

(e) Jeffrey D. Haggray, residing at 3545 16th St., N.W., Wash., D.C. 20010;

(f) Wilbur F. Jackson, residing at 1711 Shepherd St., N.W., Wash., D.C. 20011;

(g) Michael Maccoby, residing at 4825 Linnean Ave., N.W., Wash., D.C. 20008;

(h) Albrette "Gigi" Ransom, residing at 219 Webster St., N.E., Apt. 2, Wash., D.C. 20011;

(i) Johnnie Scott Rice, residing at 4262 Mass., Ave., S.E., Wash., D.C. 20019;

(j) Brenda Lee Richardson, residing at 3008 24th Pl., S.E., Wash., D.C. 20020;

(k) Alice M. Rivlin, residing at 2838 Chesterfield Pl., N.W., Wash., D.C. 20009;

(l) Pete Ross, residing at 1712 Surrey Ln., N.W., Wash., D.C. 20007;

(m) Kaye E. Savage, residing at 18 Ingraham St., N.W., Wash., D.C. 20011;

(n) Iris J. Toyer, residing at 2211 S St., S.E., Wash., D.C. 20020;

(o) Melody Regina Webb, residing at 612 G St., S.W., Wash., D.C. 20024;

(p) Bathrus B. Williams, residing at 2500 Virginia Ave., N.W., Wash., D.C. 20037;

(q) Roger Wilkins, residing at 1253 4th St., S.W., Wash., D.C. 20024; and

(r) Malcolm L Wiseman, Jr, residing at 1228 Crittenden St., N.W., Wash., D.C. 20011

16. Each individual is subjected to substantially higher taxes because of the Prohibition. Each individual is discriminated against in favor of non-residents who earn income in the District.

17. Plaintiff District of Columbia (the "District") is a municipal corporation. Its address is 1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004. The District is injured because it is deprived of the right to determine whether to tax non-residents on their income earned in the District, and if so, at what rate, and because it is unable to deliver the level of services needed for its residents because it is unable to raise the funds necessary to support that level without overtaxing District residents.

18. Plaintiff Anthony A. Williams is the Mayor of the District of Columbia and joins this action in his official capacity as Mayor of the District. His address is 1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004.

19. Plaintiff Council of the District of Columbia (the "District Council") is a governmental entity of the District of Columbia. Its address is 1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004.

20. Each individual member of the District Council joins this action in her or his official capacity. The address of each Councilmember is 1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004. The Councilmembers are:

a. Linda W. Cropp, Chairman
b. Sandy Allen
c. Sharon Ambrose
d. Harold Brazil
e. David A. Catania
f. Kevin P. Chavous
g. Jack Evans
h. Adrian Fenty
i. Jim Graham
j. Phil Mendelson
k. Vincent B. Orange, Sr.
l. Kathleen Patterson
m. Carol Schwartz

21. But for the Prohibition, the District Council would enact an income tax on all income earned within the District, whether earned by residents or by non-residents. *See* attached Resolution of District Council, made a part of this Complaint. But for the Prohibition, Mayor Williams would approve such an enactment. The District Council and Mayor Williams, therefore, seek a determination regarding the constitutional validity of the Prohibition.

22. Defendant United States of America is responsible, through the United States Congress and the President, for passing and enforcing the Prohibition at D.C.

Official Code § 1-206.02(a)(5). That statute is, as set forth herein, unconstitutional and injurious to the Plaintiffs.

23. Defendants United States Department of Justice and John Ashcroft, in his official capacity as Attorney General of the United States, are responsible for enforcing the Prohibition at D.C. Official Code § 1-206(a)(5). That statute, as set forth herein, is unconstitutional and injurious to the Plaintiffs.

FACTUAL BACKGROUND

A. Only The District Is Barred From Taxing Non-Resident Income Earned Within Its Borders

24. Congress has prohibited the District, and the District alone, from taxing income earned within its borders by persons who reside elsewhere. When it granted home rule in the 1973 "Home Rule Act," Congress included the Prohibition, which bars the District Council from imposing income taxes on income earned by non-residents in the District. Title VI § 602(a)(5). The Act provides that the District Council "shall have no authority to . . . impose any tax on the whole or any portion of the personal income . . . of any individual not a resident of the District . . . ." *Id.*, *codified in* D.C. Official Code § 1-206.02(a)(5).

25. The Prohibition discriminates in favor of residents of the states, who are represented in Congress, and against residents of the District, who are not represented in Congress. Through the Prohibition, the Members of Congress exempted their constituents from income taxation and effected a substantial transfer from the treasury of the District to the treasuries of the states they represented. Congress also created a special rule of inter-jurisdictional taxation applicable only to the District.

26. The Prohibition departs from the universal rule that income may be taxed by the jurisdiction in which it is earned. The rule follows from the fact that the jurisdiction where the income is earned provides services that permit or facilitate the earning of the income. All forty-one states with an income tax have the power to impose that tax on income earned within their borders by both residents and non-residents. All forty-one states, in fact, impose their income tax on residents and non-residents alike (unless they reach a voluntary "reciprocity agreement" with another state not to tax each other's residents). Similarly, the United States imposes its income tax on income earned within the United States by non-residents. Indeed, the United States imposes its income tax on income earned in *the District of Columbia* by foreign citizens who earn income here. Other federal territories, such as Guam and Puerto Rico, do the same.

27. Double taxation at the state level is avoided by a system of credits granted by the jurisdiction of residence for taxes paid to other jurisdictions in which income is earned.

B. As A Result Of The Prohibition, The Majority Of Income Earned Within The District Cannot Be Taxed By The District

28. Non-residents earn over seventy percent of all personal income in the District.

29. Non-resident workers also constitute over seventy percent of all workers in the District. These non-resident workers number about 500,000.

30. The amount of income earned annually in the District by non-residents exceeds $30 billion. Virginia, Maryland, and the other states currently enjoy a significant financial benefit from fully taxing over $30 billion in income

earned within the District by their residents, which the Prohibition forbids the District from taxing. Thus, most employment in the District generates income tax revenue for Maryland, Virginia, and the other states, even though this is contrary to the universal principle, and even though the District provides significant services to non-residents that help make such income possible.

C. Because Of The Prohibition, The District Cannot Even Tax All The Income Earned By Its Own Residents In The District

31. Because of the Prohibition, the District cannot effectively tax all of the income earned *by its own residents in the District*.

32. As already described, the Prohibition departs from the universal system of inter-jurisdictional taxation under which the primary right to tax income is enjoyed by the jurisdiction where it is earned, and double taxation is avoided by credits granted by the jurisdiction of residence. The result of this departure is that all of the states with income taxes follow the universal system, while the District alone is required by Congress to follow a different system. This lack of uniformity leads to irrational results.

33. For example, many large law, accounting, and other professional partnerships have offices and earn income both in the District and in other states. The partners of these firms who reside in the District pay income taxes to the other states on the portion of their firms' income attributable to their firms' offices in those states; and, through the system of credits, these District partners reduce their tax payments to the District by an equivalent amount. But the partners in the partnership offices outside the District of Columbia pay no income taxes to the District on income attributable to the offices here.

34. Therefore, in the case of a two hundred-partner law firm with half its partners residing and working in the District, and the other half in New York, taxes on approximately *three-quarters* of the firm's income effectively would be paid to New York state, and income taxes on approximately *one-quarter* of the firm's income effectively would be paid to the District of Columbia.

35. This is so for the following reasons. The District partners would pay taxes on half of their income to New York, because half their income is deemed earned in New York. They then receive a credit on their District tax return for the taxes paid to New York, cutting their District taxes approximately in half. The New York partners, however, effectively pay taxes on 100% of their income to New York, even though half of it was deemed earned in the District, because the District is not permitted to tax non-residents. So New York collects taxes on all the income of the New York partners, and half the income of the Dist partners, or three-fourths of the total. The District collects taxes on only half the income of the District partners, or one-fourth of the total. Thus, in this representative example, the District cannot fully tax even its own residents without denying them their credit for taxes paid to New York, and subjecting them to unfair double taxation. This is an irrational result.

D. Non-Residents Impose Significant Costs On The District

36. Approximately 500,000 non-residents travel into the District every work day, effectively doubling the population of the District. This influx imposes significant uncompensated costs on the District, including costs for mass transit, police and fire protection, trash collection, and road and bridge maintenance.

37. Because of the Prohibition, however, the non-resident workers contribute nothing in the way of income taxes to bear their fair share of the costs of services they receive.

E. The Prohibition Is The Substantial Cause Of The District's Structural Deficit

38. The GAO issued a report on June 5, 2003 that confirms the District suffers from a "structural imbalance" preventing it from providing an average level of services at average tax rates. The GAO Report defined "structural imbalance" as follows: "A fiscal system is said to have a structural imbalance if it is unable to finance an average (or representative) level of services by taxing its funding capacity at average (or representative) rates." GAO Report at 3.

39. The GAO concluded that the District faces a "substantial structural deficit" ". . . in the sense that the cost of providing an average level of public services exceeds the amount of revenue it could raise by applying average tax rates." *Id.* at 8, 12, 31. The GAO estimated the structural deficit to be $470 million to $1.1 billion annually. *Id.* at 31. This structural imbalance exists even *after* taking account of all "federal grants" to the District each year. *Id.* at 8, 9, 114.

40. The GAO also concluded that no matter how efficiently the District government operates, it cannot overcome the structural deficit given its current revenue constraints. "The existence of this structural deficit means that even if the District's services were managed efficiently, the District would have to impose above-average tax burdens just to provide an average level of services." *Id.* at 8. "[M]anagement improvements will not offset the underlying structural imbalance because it is caused by factors beyond the direct control of District officials." *Id.* at 14-15.

41. Thus, given the Prohibition, if the District were to tax its residents at average tax rates, its revenues would fall short of the amount needed to provide an average level of services to its citizens by $470 million to $1.1 billion each year. *Id.* at 8, 12. Given the urban character of the District, as compared with states, the structural deficit is at or greater than the high end of the GAO's estimate. Furthermore, in making this estimate, the GAO did not take into account "the various public safety demands and costs associated with the federal government's presence," such as the unique costs imposed on the District for crowd control associated with demonstrations drawn to the nation's capital. *Id.* at 11, 27, 31. If these unique District costs were taken into account, the structural deficit would be even higher.

42. The Prohibition is an important cause of the structural deficit. GAO states: "Unlike that of any state, the District's government is prohibited by federal law from taxing the District-source income of nonresidents." *Id.* at 43. "Without changes in the underlying factors driving expenses and revenue capacity, the structural imbalance will remain." *Id.* at 15.

43. The lifting of the Prohibition would allow the District to substantially if not totally eliminate its structural deficit and reduce taxes on its overtaxed residents. The average income tax rate imposed on District residents is approximately twice the national average. If the District were permitted to tax non-resident income, as all the states can do, it would be able to lower its rates on its residents to at or near the national average and still substantially increase its total revenues.

44. Income taxes currently contribute a little over $1 billion towards the District's annual budget of approximately $7 billion. But for the Prohibition, the District would tax income earned within its borders by non-residents.

If the District were to impose an income tax on residents and non-residents at half the current District income tax rates, it would increase the District's total income tax revenues by approximately $600 million. The structural imbalance, estimated by GAO to be between $470 million and $1.1 billion, would thereby be greatly reduced and might well be eliminated.

F. Federal Contributions Do Not Cure The Structural Imbalance

45. The structural imbalance caused by the Prohibition is not cured by grants and aid that the federal government gives the District.

46. For many years prior to 1997, Congress made an annual payment to the District (the "federal payment"). The purpose of the federal payment was to compensate the District, in part, for the costs and burdens placed on the District by the federal presence. Congress abolished the federal payment in 1998. Since then, Congress has funded directly certain specific "state-like" functions previously funded through the District's budget, such as the courts, the prisons, and the obligations created by the pre-Home Rule portion of the pension fund for former federal (now District) employees.

47. Neither the federal payment, when it existed, nor the direct funding of specific "state-like" functions cured the structural imbalance. For example, wholly apart from the Prohibition and the District's uncompensated costs of serving the federal government, the District loses over $500 million each year in rental property taxes because 42 percent of the real property in the District (by value) is tax exempt (largely because it is owned by the federal government).

48. The GAO found that the District is burdened with a structural imbalance of from $470 million to $1.1 billion per year, even *after* taking account of all federal grants and aid to the District.

G. Plaintiffs Are Injured By The Prohibition On A Non-Resident Income Tax

49. As a direct result of the Prohibition, the Plaintiffs suffer unique and substantial injury in the following ways.

50. First, because of the Prohibition, District residents must pay higher taxes in order to cover the costs of services to non-residents. As a result, District residents bear substantially higher than normal tax burdens.

51. Second, as a result of the Prohibition, the District perennially suffers revenue deficiencies. Without adequate revenue, District services must be curtailed. This harms District residents in many ways, including restrictions in services offered by public schools, health facilities, and public welfare agencies. Non-resident commuters likewise are harmed by the resulting inadequate services, such as street maintenance.

52. Third, as a result of the Prohibition, the District perennially suffers an inability to fund critical infrastructure improvements. The District must "continue to defer infrastructure improvements" because of its structural deficit, including needed repairs to streets and schools. GAO Report at 10, 14, 71.

H. Lifting The Prohibition Would Redress These Injuries

53. Allowing the District to tax non-resident income earned within its borders would provide hundreds of

millions of dollars in needed revenue for the District. This, in turn, would enable the District to (a) ease the burden on overtaxed District residents; (b) provide more and better services to residents and nonresidents alike; and (c) proceed with critical infrastructure improvements.

54. The District would adopt a non-resident income tax in the absence of the Prohibition. The District Council has unanimously passed a Resolution, attached hereto and made part of this Complaint, demonstrating that it wishes to pass a non-resident income tax and would do so but for the Prohibition.

55. Under current law, all non-residents that ultimately would pay income tax to the District would receive a credit on any income tax returns filed in their states of residence.

COUNT ONE
THE PROHIBITION VIOLATES THE UNIFORMITY CLAUSE, THE PRIVILEGES AND IMMUNITIES CLAUSE, THE EQUAL PROTECTION CLAUSE, AND THE DUE PROCESS CLAUSE OF THE U.S. CONSTITUTION

56. Plaintiffs repeat the allegations of all the above paragraphs as if fully set forth herein.

57. The Prohibition discriminates against a particular geographic area of the country. The Prohibition discriminates in favor of citizens represented in Congress and against citizens who are not represented in Congress. For either or both of these reasons, the Prohibition must be subjected to strict scrutiny by a court of law, and pursuant to such strict scrutiny, declared unconstitutional.

A. Geographic Discrimination

58. Taxation was a subject of grave concern to the Framers of our Constitution. They were careful to guard against the possibility that Congress would enact discriminatory taxation against the people of a particular region of the country. Thus, "direct taxes" were required to be strictly apportioned among the states according to population. U.S. CONST. art. I, § 2, cl. 3; U.S. CONST., art. I, § 9, cl. 4. All other taxes were required to be "uniform throughout the United States." U.S. CONST., art. I, § 8, cl. 1.

59. The Sixteenth Amendment to the Constitution removed the "apportionment" requirement as to federal income taxes. Income taxes, however, remain subject to the Article I, § 8 requirement of geographic uniformity. Thus, Congress may not impose income taxes at one rate for one state or area, and at a different rate for another state or area.

60. The constitutional uniformity requirement also forbids discriminatory rules of inter-jurisdictional taxation enacted by Congress if they have the effect of imposing greater tax burdens on one area than on other areas.

61. One of the signers of the Constitution, Hugh Williamson, explained to the Second Congress the intent of this "uniformity" requirement:

> The clear and obvious intention of the articles mentioned was that Congress might not have the power of imposing unequal burdens; that it

> might not be in their power to gratify one part of the Union by oppressing another.[53]

62. Williamson explained further that the framers were concerned that:

> ... the Representatives of one part of the Union might attempt to impose unequal taxes, *or to relieve their constituents at the expense of other people* (emphasis added).[54]

63. The Prohibition at issue is an unambiguous example of a tax law through which Members of Congress sought to "relieve their constituents at the expense of other people."

64. In *United States v. Ptasynski*, 462 U.S. 74, 81 (1983), the Supreme Court explained that the purpose of the Uniformity Clause is to "cut off all undue preferences of one State over another." But for the Uniformity Clause, the Court stated, "the grossest and most oppressive inequalities vitally affecting . . . people of different States might exist." *Id.* Thus, the Court held that where Congress frames a tax law "in geographical terms, we will *examine the classification closely* to see if there is actual geographical discrimination." *Id.* (emphasis added). Such geographical discrimination is presented here and it is forbidden by the Uniformity Clause.

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53 2 Annals of Congress, 378 (1792) (quoted in 3 Max Farrand, *The Records of the Federal Constitution of 1787*, at 365 (1966). *See also United States v. Ptasynski*, 462 U.S. 74, 81 (1983).

54 *Id.*

B. Discrimination Against Unrepresented Citizens

65. Our Founders had a profound distrust of taxation without representation. They so stated in the Declaration of Independence.

66. Our courts have declined to adopt a constitutional rule forbidding all taxation without representation. They have permitted Congress to tax the District and they have permitted states to tax non-residents, but only when such unrepresented citizens are treated equally with citizens who are represented in the taxing legislature.

67. When a legislature enacts a taxation law that discriminates against unrepresented citizens, the courts will subject the law to heightened scrutiny. This is because democratically elected legislatures will be strongly inclined to favor their own constituents, and the unrepresented citizens injured by the discriminatory law lack any democratically based remedy in the legislature that enacted the law.

68. Both the Equal Protection and the Privileges and Immunities Clauses ensure that no citizen will be subjected to inter-jurisdictional discriminatory tax legislation imposed by a sovereign in whose legislature the citizen has no representation. Instead, those constitutional provisions (either directly or through the Due Process Clause of the Fifth Amendment) require that unrepresented citizens be treated equally with represented ones.

69. The Prohibition is tax legislation that discriminates against the unrepresented District and its citizens. It transfers the right to tax billions in income away from the District and effectively gives it to Virginia and Maryland, and other states. It exempts represented non-

residents from paying their fair share of services they receive. It causes the imposition of a heavier tax burden on District residents.

C. The Prohibition Cannot Survive Strict Scrutiny and Also Lacks Any Rational Basis

70. The Prohibition has left the District with a structural deficit that is not cured by any federal payments, grants, or aid. The structural deficit is as large as $1.1 billion per year or about fifteen percent of the District's budget. The Prohibition forces the District to overtax its residents and prevents it from providing even average levels of service. It constitutes the sole departure by Congress from the universal rule that the primary right to tax income belongs to the jurisdiction where it is earned. The Prohibition cannot survive strict scrutiny.

71. The Prohibition is a law whose only purpose is to benefit citizens and areas of the country that are represented in Congress, at the expense of the District and its citizens, who are not. This is an illegitimate purpose that lacks even a rational basis.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that:

a. the Court declare unconstitutional Section 602(a)(5) of the Home Rule Act, codified at D.C. Official Code § 1-206.02(a)(5), or any similar Prohibition by Congress on the authority of the District Columbia to tax non-resident income that is earned within the District of Columbia;

b. the Court enjoin the United States and its officers from applying or enforcing Section 602(a)(5) or any similar provision against the Plaintiffs; and

c. Plaintiffs be awarded such other relief as the Court deems just and proper.

JURY DEMAND

Pursuant to Fed. R. Civ. P. 38(b), trial by jury is demanded on all issues.

Dated: July 24, 2003 Respectfully submitted,

/s/

Walter Smith
D.C. Bar #238949
D.C. APPLESEED
CENTER FOR LAW
AND JUSTICE
733. Fifteenth St., N.W.,
Suite 300
Washington, DC 20005
(202) 393-1158
(202) 393-1495 (facsimile)

Co-Counsel for Plaintiffs District of Columbia, Mayor Anthony Williams, District Council, and Members of the District Council

John W. Nields, Jr.,
D.C. Bar #328955
HOWREY, LLP
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 783-0800
(202) 383-6610 (facsimile)

Gary Thompson
D.C. Bar #435315
GILBERT HEINTZ &
RANDOLPH, LLP
1100 New York Avenue, Suite 700
Washington, D.C. 20005
(202) 772-2200
(202) 772-3333 (facsimile)

Lois G. Williams
D.C. Bar #365894
WASHINGTON LAWYERS'
COMMITTEE
FOR CIVIL RIGHTS
& URBAN AFFAIRS
11 Dupont Circle, N.W.
Suite 400
Washington, D.C. 20036
(202) 319-1000
(202) 319-1010 (facsimile)

Carolyn Lamm
D.C. Bar #221325
WHITE & CASE, LLP
601 Thirteenth St. N.W.
Suite 600 South
Washington, D.C. 20005
(202) 626-3674
(202) 639-9355 (facsimile)

Co-Counsel for Plaintiffs Citizens of the District of Columbia

/s/

Chairman Linda W. Cropp

/s/	/s/
Councilmember Carol Schwartz	Councilmember Harold Brazil
/s/	/s/
Councilmember Phil Mendelson	Councilmember David A. Catania
/s/	/s/s
Councilmember Jim Graham	Councilmember Jack Evans
/s/	/s/
Councilmember Kathleen Patterson	Councilmember Adrian Fenty
/s/	/s/
Councilmember Vincent B. Orange, Sr.	Councilmember Sharon Ambrose
/s/	/s/
Councilmember Kevin P. Chavous	Councilmember Sandy Allen

A PROPOSED RESOLUTION

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To declare, on an emergency basis, the sense of the Council that there exists in the District's fiscal system a structural imbalance making it impossible for the District to provide average levels of service without overtaxing its residents, that this structural imbalance is caused in part by a federal law prohibiting the District from taxing non-resident income, and that the Council should join as a party in a lawsuit challenging the constitutionality of the federal law.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Sense of the Council in Support of Litigation Challenging the Constitutionality of the Congressional Prohibition on the District's Ability to Tax All Income Earned Within District Borders Emergency Resolution of 2003."

Sec. 2. The Council finds that:

(1) The United States General Accounting Office ("GAO"), has concluded after extensive study, in a report issued in May 2003 that a "structural imbalance" exists in the District's fiscal system, which requires the District to overtax its citizens in order to provide even average services to those who live and work here.

(2) This is also the conclusion recently reached by independent experts at the American Economics Group, Inc., after a similarly extensive study.

(3) According to the GAO, "a fiscal system is said to have a structural imbalance if it is unable to finance an average...level of services by taxing its funding capacity at average rates."

(4) The GAO concluded that there is a "substantial structural deficit" suffered by the District. Its lowest estimate for this deficit is $470 million and its highest is $1.1 billion, each year. This insurmountable structural imbalance exists after taking account of all "federal grants" to the District each year.

(5) The GAO states that the "existence of this structural deficit means that even if the District's services were managed efficiently, the District would have to impose above-average tax burdens just to provide an average level of services" and that "management improvements will not offset the underlying structural imbalance because it is caused by factors beyond the direct control of District officials."

(6) As a result of this structural imbalance, the District has been forced to overtax its residents in order to raise enough revenue just to provide average levels of service to people who live and work in the District. Simultaneously, the structural imbalance has prevented the District from making badly needed capital expenditures to maintain and improve its infrastructure.

(7) The structural imbalance is caused at least in part by a statute enacted by the United States Congress that prohibits the District – and only the District – from taxing income earned within its borders by non-residents.

(8) The appropriate cure for the structural imbalance would be a tax on income earned by non-residents in the District. Depending on its rate, such a tax would close part or all of the imbalance.

(9) It is a universal principle of taxation that all income may be taxed where it is earned. Each of the forty-one States with income taxes imposes them on residents and non-residents alike. Only the District has been prohibited by the Congress from doing so, in section 602 of the Home Rule Act (the "Prohibition").

(10) Non-residents impose significant costs on government services, and the District should have the universal right to require these non-residents who use its services to make some fair contribution to those costs.

(11) Over 60 percent of income earned in the District is earned by non-residents. A tax on non-resident income would permit the District to:

(a) Reduce taxes on its residents,; and

(b) Raise the revenue required to provide improved services to residents and non-residents alike. Non-residents would be entitled to a credit against their home State returns for non-residents taxes paid to the District.

(12) But for the Prohibition, the Council would enact a law to reduce income tax rates on its overtaxed residents and impose a fair and reasonable income tax on non-residents.

(14) The Prohibition discriminates in favor of residents of States that have voting representation in Congress and against residents of the District who lack such representation.

(15) Taxation without representation has always been suspect in this country, beginning with our Declaration of Independence. Tax laws which discriminate against people who are unrepresented in the taxing legislature are even more upset.

Sec. 3. It is the sense of the Council that the Congressional Prohibition against a non-resident income tax in the District is a discriminatory tax law which has resulted in a substantial structural imbalance in the District and the overtaxing of the District residents, and that this discrimination cannot be justified and must be promptly rectified. It is also the sense of the Council that while it will continue to work diligently in support of efforts to persuade Congress to repeal the Prohibition or to find other means to compensate the District for the revenue lost by the Prohibition, the Council will join in a lawsuit seeking a declaration that the Prohibition is unconstitutional.

Sec. 4. This resolution shall take effect immediately.

No. 05-970

In The Supreme Court of the United States

JAMES M. BANNER, JR., *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF JUSTICE, ALBERTO GONZALES, in his official capacity as Attorney General of the United States, the STATE OF MARYLAND, and COMMONWEALTH OF VIRGINIA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

THE COMMONWEALTH OF VIRGINIA'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

ROBERT F. MCDONNELL
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

WILLIAM C. MIMS
Chief Deputy Attorney General

MAUREEN RILEY MATSEN
Deputy Attorney General

D. MATHIAS ROUSSY, JR.
Assistant Attorney General

Counsel for the Commonwealth of Virginia

April 5, 2006

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does the Constitution's unique treatment of the District of Columbia and its residents require the application of heightened scrutiny for Equal Protection and Uniformity Clause purposes?

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BRIEF IN OPPOSITION

The Attorney General of the Commonwealth of Virginia, Robert F. McDonnell, responds to the Petition for a Writ of Certiorari.[1]

INTRODUCTION

The Constitution gives Congress exclusive authority to create and govern a distinct geographic area – to serve as the Nation's Capital – in order that the National Government might operate in a place where Congress controls the circumstances and safety of the place in which it conducts its business. U.S. Const. art. I, § 8, cl. 17. The Constitution does not, however, accord the residents of that federally created District a representative in Congress.[2] Thus, the unique conditions of the District and its residents as citizens without a representative in the legislature that taxes them, living in a distinct geographic region, reflects the clear and purposeful intent of the Framers to provide Congress with exclusive control over the seat of the National government. *See The Federalist No. 43* (James Madison) (Clinton Rossiter, ed. 1961).

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[1] On February 16, 2006, this Court extended the time for such filing to and including April 5, 2006.

[2] The Twenty-third Amendment, U.S. Const. amend. XXIII, confirms the absence of such Constitutional grant by altering the original provisions to permit residents of the District to vote in Presidential elections. Only a similar constitutional amendment could alter the status of residents in the District with regard to representation in Congress.

Residents of the District enjoy the many constitutional protections accorded to individual citizens. However, those protections are not implicated by Congressional legislation concerning delegation of taxing authority to the District's local government. Moreover, that local government, as a creation of Congress, has no inherent or sovereign powers but only the powers delegated to it by Congress. It has no rights against the Sovereign that created it.

Petitioners' allegations of exorbitant tax rates, "structural deficits," and the intrinsic unfairness of their Constitutional lot are political rather than legal issues. Decisions about how to fund the operation of the Nation's capital city, and how to solve its financial challenges, are fundamentally legislative and executive in character. Untangling the web of financial and administrative actions that brought the District of Columbia to its current financial situation is a task well outside the proper role of any court. Thus, Petitioners' underlying cause and their Petition fail to present a substantial issue of law in need of resolution by this Court.

In the face of the lower courts' unequivocal rejection of their novel legal theories, Petitioners retreat from their frontal assault on the authority of Congress and seek certiorari on a narrower question. They ask this Court to consider whether the unique conditions of the District, as established by the Constitution and described above, mean that Congress' exercise of its authority to withhold from its local government the power to impose a commuter tax, must be subjected to strict scrutiny. This is not an important constitutional question because the answer is not in

doubt. For that reason alone, the Petition should be denied. In addition, however, Petitioners arguably lack standing to bring their challenge: a jurisdictional problem that also ought to preclude this Court's review.

STATEMENT OF THE CASE

1. Background

The Constitution gives Congress exclusive legislative authority in all matters pertaining to the District of Columbia. U.S. Const art. I, § 8, cl. 17. It was the intention of the Framers that the National Government would reside and operate in a place where, because Congress had plenary authority over the operation of the place, it could not be "harassed or neglected by local interests." *App.* at 10a. When it legislates for the District, it does so "in like manner as the legislature of a state." *Gibbons v. District of Columbia*, 116 U.S. 404, 407 (1886). It stands in the same relation to the residents of the District as a state legislature does to residents of its own State. *See Mercury Press v. District of Columbia*, 173 F.2d 636, 637 (D.C. Cir. 1948). Thus, Congress not only legislates for the District's residents as citizens of the Nation, it also legislates for them separately and locally, as citizens of the Nation's Capital. In the latter capacity, Congress may "exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes." *Palmore v. United States*, 411 U.S. 389, 397 (1973).

Over the years, Congress has carried out its exclusive authority over the District in different ways: once providing for three distinct local governments in the District; later creating a three-person commission for governing a unified District; and, in the 1970's, adopting what is known, colloquially, as "Home Rule." *See* District of Columbia Self-Government and Governmental Reorganization ("Home Rule") Act, Pub. L. No. 93-198, 87 Stat. 774 (1973). The Home Rule Act creates a local government for the District and delegates particular powers to it. In so doing, it expressly continues Congress' close involvement in the management of the District's finances.

Though delegating power and autonomy on many subjects, the Home Rule Act is clear that the powers delegated remain "[s]ubject to the retention of Congress of the ultimate legislative authority over the nation's capital." *D.C. Code* § 1-201.02(a). The Act expressly provides that the enactments of the local government will only become law if Congress does not act to disapprove them within thirty (or sixty) days. It provides also that Congress has full power to repeal the enactments of the local government, at any time. *See D.C. Code* §§ 1-206.01, 1-206.02(c)(1)-(c)(2).

In addition, the Home Rule Act specifically limits the local government's powers, identifying a list of matters that are not "rightful subjects" of legislation by the local government. *D.C. Code* §§ 1-203.02, 1-206.02(a). Among those are: taxation of federal property; regulation of local (and federal) courts; height restrictions on the construction of new buildings; and the prohibition challenged here – imposition of an income tax on the income "of any individual not a resident of the District. . . ." *Id.* § 1-206.02(a). As noted by the district court below, the

balance of authority struck by the Home Rule Act may be characterized as "a reasonable and rational accommodation between the interests of all Americans in their Nation's Capital and the basic principle that government should be responsible to the people." *App.* at 23a (quoting legislative history).

2. Proceedings in the District Court

Petitioners in this matter are: (1) the District of Columbia itself; (2) its City Council; (3) the members of the City Council in their official capacities; (4) the Mayor of the District; and (5) several District residents. Together these government entities, public officials and individuals sued the United States, the United States Department of Justice, and the Attorney General in his official capacity. They alleged that Congress' decision to withhold from the local government of the District the power to tax non-residents is unconstitutional. The Commonwealth of Virginia and the State of Maryland intervened on the side of the United States.

Petitioners' complaint asserted that: (1) Congress' refusal to allow the District to impose a commuter tax violates the Equal Protection aspect of the Fifth Amendment's Due Process Clause because it disfavors District residents in favor of non-residents, in a circumstance where the non-residents are represented in Congress and the residents are not; (2) the prohibition must, therefore, meet the test of strict scrutiny; and (3) the prohibition violates the Uniformity and Privileges and Immunity Clauses of the Constitution. "[T]he claims [were] premised on a series of Supreme Court tax cases that [Petitioners] use to craft a legal principle outlawing discrimination in

the imposition of taxes against unrepresented citizens in favor of represented ones. Applying this principle to Congress' ban on the District's use of a commuter tax, Petitioners argue that the Prohibition must be invalidated." *App.* at 26a.

The United States, Maryland, and Virginia each filed a motion to dismiss the complaint for failure of subject matter jurisdiction and its failure to state a claim. Virginia pointed first to the important jurisdictional issues presented by Petitioners' complaint. It challenged the standing of the Government Plaintiffs because their allegations presented a purely political question. Virginia also challenged the sufficiency of the allegations of the individual residents of the District for the purposes of satisfying the requisites of Article III standing.

The district court ruled that the individual residents satisfied the Article III requirements, but then dismissed the complaint on the merits. In so doing, the district court held that "Congress' plenary power over the District and its residents and their unique status within our constitutional framework" mean that the challenged prohibition does not violate Equal Protection, the Uniformity Clause or the Privileges and Immunities Clause of the Federal Constitution. *App.* at 63a. Moreover, the court ruled that because residents of the District are not a suspect class but a constitutionally created one, and because the District's local government has no fundamental right to tax anyone, and the residents have no fundamental right to be treated the same as non-residents for purposes of taxation or for any other purpose, strict scrutiny did not apply. *App.* at 52a, 54a.

3. The Appeals

Petitioners appealed the dismissal of their complaint to the Court of Appeals for the District of Columbia Circuit. In a per curiam opinion, the court of appeals affirmed the district court's dismissal of the complaint. In doing so, the court of appeals rejected Petitioners' argument that Congress' prohibition of a commuter tax should be subjected to strict scrutiny and held that "the commuter tax restriction does not violate equal protection or the Uniformity Clause of the Constitution." *App.* at 16a. The court of appeals concluded that because, "[i]n governing the District, Congress can 'exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes' . . . it undoubtedly has the authority to enact taxes for the District alone, just as a state could." *App.* at 12a-13a (quoting *Palmore*, 411 U.S. at 397). It explained further that

> [t]he commuter tax restriction is more properly viewed as simply an aspect of Congress' authority to levy local taxes on the District and therefore entirely consistent with the Uniformity Clause. Congress has delegated to the District government the power to levy an income tax while restricting the kinds of income the District may tax.

App. at 15a. Finally, the court of appeals rejected Petitioners' Equal Protection argument because it ignored "the special character of the District under the Constitution." *App.* at 10a.

REASONS FOR DENYING THE WRIT

Certiorari should be denied for two reasons. First, the Petitioners' legal theory not only has no basis in the Constitution but is contrary to it. Second, even if there were some basis for Petitioners' novel legal theory, they lack standing to challenge Congress' action.

I. THE FACT THAT THE DISTRICT IS NOT A STATE DOES NOT WARRANT STRICT SCRUTINY.

Petitioners ask this Court to review the decision below only insofar as the Court of Appeals declined to subject the challenged legislative action to strict scrutiny. Yet, strict scrutiny is appropriate only where the government has taken action that either relies upon suspect classifications or impinges upon a fundamental right. *See Vacco v. Quill*, 521 U.S. 793, 799 (1997); *Massachusetts Bd. of Retirement v. Mulgia*, 427 U.S. 307, 312 (1976). Those circumstances are not present here. Though Petitioners labor mightily to fit the square peg of the challenged legislation into the round hole of government action that requires strict scrutiny, the effort cannot succeed. It cannot succeed because at its foundation is the premise that the law of taxation, as it applies to Congress and the States, applies the same to Congress and the District. This premise is false. As a matter of constitutional structure neither the District nor its residents have the same rights to tax – or to be taxed – as States and the residents of States. The Petition for Certiorari should be denied.

A. Because the District Has Unique Constitutional Status, It May Be Treated Differently than States Without Raising Equal Protection Concerns.

As the area designated by the Constitution as "the seat of the government of the United States," the District is unique among American cities. U.S. Const. art. I, § 8, cl. 17. It is "the very heart of the Union itself, to be maintained as the 'permanent' abiding place of all its supreme departments, and within which the immense powers of the general government were destined to be exercised. . . ." *District of Columbia v. Carter*, 409 U.S. 418, 432 (1973) (quoting *O'Donoghue v. United States*, 289 U.S. 516, 539 (1933)). It is "truly *sui generis* in our governmental structure." *Carter*, 409 U.S. at 432. Thus, it is beyond question that the District is "constitutionally distinct from the States." *Palmore*, 411 U.S. at 395.

The unique situation of the District, particular aspects of which are offered by Petitioners in support of the application of strict scrutiny to the federal legislation they challenge, is a set of circumstances created for the District by the Constitution itself. Such constitutionally established circumstances: (1) that Congress has exclusive power to legislate for the District on all subjects, in spite of its dual role and the potentially competing interests of its members; and (2) that the District does not have a representative in Congress and therefore does not have a vote in the legislature that legislates for it, simply cannot render Congressional legislation for the District subject to strict scrutiny. Only if the District and its residents were clothed with the rights and protections accorded to the States – by virtue of their separate sovereignty – could Petitioners' arguments succeed. However, the Constitution

is to the contrary on this point. It grants the attributes of sovereignty to the National Government only, and preserves them to the States. It does not bestow them upon the District created to serve as the seat of the National government. Indeed, to do so would be to encourage the very danger that the Seat of Government Clause was adopted to prevent: that the National Government would sit and conduct its affairs in a location subject to and dependant upon a sovereign power other than its own, and thus be subject to neglect or difficulty at the whim of that power.[3] *See The Federalist No. 43* at 240-41.

Congress' exclusive legislative authority, pursuant to the Seat of Government Clause, is distinct from its limited authority to legislate for the Nation. In our system of dual sovereignty, when Congress legislates for the Nation, there are boundaries it cannot go beyond without violating the sovereignty of the States. No such boundaries constrain

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[3] The indispensable necessity of complete authority at the seat of government carries its own evidence with it. It is a power exercised by every legislature of the Union, I might say of the world, by virtue of its general supremacy. Without it not only the public authority might be insulted and its proceedings interrupted with impunity, but a dependence of the members of the general government on the State comprehending the seat of the government for protection in the exercise of their duty might bring on the national councils an imputation of awe or influence equally dishonorable to the government and dissatisfactory to the other members of the Confederacy. This consideration has the more weight as the gradual accumulation of public improvements at the stationary residence of the government would be both too great a public pledge to be left in the hands of a single State, and would create so many obstacles to a removal of the government, as still further to abridge its necessary independence.

The Federalist No. 43, at 240.

Congress' power when it legislates for the District. Thus, Congress is empowered to act in dual capacities, not only as the federal legislature acting for the citizens of the Nation, but also as the District's legislature, acting for the citizens who reside there. This is true notwithstanding the fact that the District is not represented in Congress. *App.* at 10a. ("[T]he fact that District residents do not have congressional representation does not alter that constitutional reality."). Unlike the New Hampshire legislature in *Austin v. New Hampshire*, 420 U.S. 656 (1975) (invalidating, under the Article IV Privileges and Immunities Clause, a New Hampshire commuter tax on the grounds that out-of-state residents who worked in New Hampshire paid taxes on income earned there, whereas New Hampshire residents did not), Congress is not "a foreign sovereign" in relation to the residents of the District. Therefore, Congress' power to tax with regard to the District is not limited as if it were.

To the extent the District's local government enjoys taxing power at all, it is by virtue of a delegation from Congress, not by virtue of the sort of sovereign authority possessed by the States. *See Allied Stores, Inc. v. Bowers*, 358 U.S. 522, 527 (1950) ("When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government of violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests."). That Congress has expressly declined to delegate the power to tax some particular income earned in the District – the income of non-residents who work there – simply does not implicate the same interests protected in *Austin* or addressed in *Wheeling Steel Corp. v. Glander*,

337 U.S. 562 (1949), *Allied Stores*, 358 U.S. at 522, or *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985). The interests addressed in those cases flowed from the separate sovereignty of the several States in our constitutional structure. Similarly, the decisions in *McCulloch v. Maryland*, 17 U.S. 316 (4 Wheat.) (1819) and *South Carolina Highway Dep't v. Barnwell Bros.*, 303 U.S. 177 (1938), involved the relative power of the States to reach beyond their own citizens with their sovereign powers. Neither has any relevance to – or places any limitation on – the power of Congress to legislate for the District pursuant to the Seat of Government Clause.

Like citizens of a locality within a State who have no fundamental right to be free from taxes imposed uniquely and pursuant to delegated power by their local government, residents of the District do not have any fundamental right to be free from a tax burden imposed by the acts of their own legislature. Nor do they have any right to share that burden with those who are non-residents of the Nation's Capital. At best, such unique treatment by a State, or by a local government empowered by a State, would be subject to rational basis scrutiny; so to, when Congress exercises – or delegates – its power to tax or not, pursuant to the Seat of Government Clause. Whatever the present day equities of the District's circumstances have become, Petitioners' effort is entirely without foundation in the law and therefore the Petition must be denied. Only by constitutional amendment can such a change be wrought.

B. The Uniformity Clause Does Not Apply To Congress' Taxation Legislation for the District.

Finally, the Constitutional creation of the District, as the seat of the National Government and a national city belonging to all of the citizens of the Nation, cannot create a suspect class, comprised of the District's residents, when Congress treats them differently than the residents of the several States. It is precisely this difference that the Founders contemplated. The very point of having a National Capital was to subject that location to Congressional rather than State authority for the benefit of the National Government. Thus, the Constitution anticipates that Congress will weigh both local and national interests when it legislates for the seat of the National government. That national considerations, rather than local ones, might in the end control Congress' decisions pursuant to its authority under the Seat of Government Clause does not render residents of the District a suspect class, or deprive them of any fundamental constitutional right, because the fact of their different treatment is contemplated by, and incorporated in, the Constitution itself. The District was, after all, created in the national interest; that it is in some particular aspect governed in the same way – in favor of the interests of all the citizens of all the States, rather than in the sole interest of the residents of the District – simply cannot violate the Uniformity Clause.

II. PETITIONERS LACK ARTICLE III STANDING TO BRING THEIR CHALLENGE.

Even if the District's dilemma did raise an important and undecided constitutional issue in need of this Court's consideration, this would not be the proper case in which

to examine the question. Before deciding any matter presented to it, a federal court must assure itself that it has jurisdiction to entertain the claim. It is not at all clear that these Petitioners satisfy the three prong test for Article III standing.[4] *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-5 (1998). Moreover, "only when adjudication is 'consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process'" should federal courts exercise their power – and then only as a last resort and a necessity. *Flast v. Cohen*, 392 U.S. 83, 97 (1968); *Chicago & Grand Trunk Ry. Co. v. Wellman,* 143 U.S. 339, 345 (1982).

The District, its City Council, the members of City Council and the Mayor (the "Government Petitioners"), as public entities and office holders, respectively, exist only by virtue of Congress' exercise of its Constitutional authority under the Seat of Government Clause. Thus, this action by the Government Petitioners, against Congress and other Federal agencies and officials, is no more than a complaint – by a creation of Congress – about the terms of its creation. Such a dispute is a purely political question. It does not implicate constitutional limitations and is in no

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[4] Pursuant to Article III of the Constitution, federal jurisdiction requires: (1) a concrete and particularized "injury in fact" that is actual or imminent; (2) that the injury be fairly traceable to the challenged action; and (3) that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000); *Steel Co.*, 523 U.S. at 103; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

way amenable to the subject matter jurisdiction of federal courts.[5]

Petitioners who are individual residents of the District allege as injury higher taxes and local revenue deficiencies. These complaints are available to all of the citizens of the District and, thus, state no cognizable injury. They do not identify any particularized harm specific to any individual, but support only a generalized "taxpayer" sort of standing generally disfavored by the courts. *Flast*, 392 U.S. at 102 ("[A] taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I § 8 of the Constitution.").

Assuming, however, that higher taxes and local revenue deficiencies somehow satisfy the injury prong of Article III standing, the allegations of the complaint probably state the necessary causal connection between those injuries and Congress' decision to withhold power to impose a commuter tax to satisfy the second prong. However, it is impossible to predict whether the relief sought by Petitioners – a declaration that Congress' prohibition of a commuter tax was unconstitutional – would provide any remedy at all for those identified injuries. In spite of the District's commitment to adopt a commuter tax if permitted to do so, given Congress' long history of rejecting imposition of such a tax itself, it is quite possible that Congress would simply respond by withdrawing the power to impose any income tax from the District. This assumes,

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[5] Because they decided that the plaintiffs who were District residents satisfied the requirements of Article III standing, neither the district court nor the court of appeals addressed the question of the standing of the Government Petitioners.

also, that Congress would not respond to the District's adoption of a commuter tax by simply vetoing or repealing any such tax, but rather would seek to correct the constitutional flaw declared by the Court rather than repeating it.

Moreover, there is no assurance whatsoever that the revenue generated by a commuter tax would result in reduction of the income tax rates imposed upon residents of the District. Indeed, it is in no way certain that additional revenues would be recognized, much less expended to reduce the "structural deficit" or infrastructure. It is entirely possible, even likely, that the imposition of a non-resident income tax would result in decisions by businesses to relocate just across the Potomac River, where prices – and local tax rates – would be lower.

Likewise, to assume that any additional revenues that might be recognized – over whatever time period they could be sustained – would result in a reduced tax burden on residents of the District is to assume that more attractive opportunities for economic development or investment would not present themselves and that City Council would resist them if they did. The series of independent business and political choices necessary before the imposition of a commuter tax in the District might remedy the injuries complained of is altogether too speculative a series of events to support Article III standing. It also serves to highlight the fundamentally political nature of Petitioners' complaint – a complaint which, at its heart, is subject only to political solution, not the jurisdiction of a federal court.

CONCLUSION

The Petition for a Writ of Certiorari should be **DENIED**.

Respectfully submitted,

ROBERT F. MCDONNELL
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

OFFICE OF THE
ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

April 5, 2006

WILLIAM C. MIMS
Chief Deputy Attorney General

MAUREEN RILEY MATSEN
Deputy Attorney General

D. MATHIAS ROUSSY, JR.
Assistant Attorney General

Counsel for the Commonwealth of Virginia

(3)

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To The United States Court of
Appeals for the District of Columbia

BRIEF OF THE STATE OF MARYLAND IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

J. JOSEPH CURRAN, JR.
Attorney General of Maryland
MICHAEL D. BERMAN*
Deputy Chief of Litigation
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6345

*Counsel of Record

Attorneys for the State of Maryland

QUESTION PRESENTED

Did both courts below correctly reject application of a heightened standard of scrutiny to the District of Columbia's challenge to a taxation provision of the Home Rule Act, in light of Congress's undisputed plenary power over the District under the "Seat of Government" clause to the Constitution?

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BRIEF OF THE STATE OF MARYLAND IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. Procedural Status

The District of Columbia (the "District") sued the United States, seeking to invalidate the portion of the 1973 Home Rule Act, D.C. CODE ANN. §1-201, *et seq.*, that prohibits it from

imposing a nonresident income tax (hereinafter the "prohibition"). That type of tax is commonly, but incorrectly, known as a "commuter tax."

Maryland and Virginia intervened as defendants. The trial court granted defendants' motion to dismiss.

In affirming that dismissal, the United States Court of Appeals for the District of Columbia recognized that "the Constitution grants Congress exclusive authority to govern the District, but does not provide the District representation in Congress." (App. A, 16a.). "That constitutional plan," the intermediate court concluded, "does not require heightened scrutiny of congressional enactments affecting the District." (*Id.*). Rather, "[t]he policy choices are Congress's to make." Therefore, the court held, "the commuter tax restriction does not violate equal protection or the Uniformity Clause of the Constitution." (*Id.*).

The District seeks to tax income earned in the District by nonresidents. The District admits, however, that the burden of that tax would fall on the States, Petit. at 8 n. 5, and, therefore, on taxpayers who do not work and earn income in the District. Yet, the District seeks to justify imposing this tax burden on citizens who do not work in the District, under principles of fairness and universality.

Contrary to the central asserted premise of the District's position, the prohibition on nonresident taxation is not discriminatory. As the courts below recognized, it is the product of sound policy based on the "Seat of Government" clause. U.S. Const., Art. I, §8, cl. 17. It is grounded in part on the federal treasury's support of the District. It also acknowledges the key fact that the District occupies land, worth billions of

dollars, that was ceded to the United States by Maryland. 45 Acts of Md. 1791. The District, having benefitted from this valuable gift, is now asking Maryland to maintain it for the District. The policy decision to reject that request is far from discriminatory.

The District contends that, due to the Congressional prohibition on nonresident taxation, an economic burden that should be shared with nonresidents is carried solely by District residents. Petit. at 3. This assertion is factually incorrect. Under the Revitalization Act, the entire Nation contributes to the operation of the District. That contribution amounts to billions of dollars.

Similarly, the District asserts that the prohibition on taxing nonresidents was enacted for the benefit of Congress's constituents. *Id.* It fact, it was enacted to further the historical role of the District as a location where the federal government could operate free of pressure from any states.

The District asserts that there is a generally accepted principle that income is taxed where it is earned. Although that principle arguably applies to each of the sovereign States, it does not apply to a municipality, which the District acknowledges itself to be. Complaint at ¶17 (App. D, 73a.). All fifty *states* have the inherent sovereign power to tax income where it is earned; however, subordinate units of government, such as the City of Rockville, Baltimore City, and Montgomery County, MD, do not have that inherent power. *Griffin v. Anne Arundel County,* 25 Md.App. 115, 126, 333 A.2d 612, 619, *cert. denied,* 275 Md. 749 (1975). The District, as a subordinate government, is in the same position as those subordinate governments. Thus, it incorrectly posits an aspect of State sovereignty, extrapolates a "universal" rule, compares

the powers of sovereign states to its powers as a city, and then asserts that it wrongfully lacks State power. It is the District's syllogism that is flawed, not the Home Rule Act.

B. Additional Facts

The District sits on land that was ceded by Maryland to Congress and the United States Government in 1789. 45 Acts of Md. 1791; D.C. CODE ANN. §1-101. In FY 2003, the land's value was $63 billion.[1] Maryland has also ceded property, income, sales, and other taxes arising on this land, and on its inhabitants and occupants, for more than two centuries. Absent Maryland's gift, the taxable value of the land and every tax dollar paid in the District since 1789 would belong to Maryland. Yet, the District now seeks more.

In 1783, Congress, sitting in Philadelphia, was besieged by unpaid soldiers. It sought help from Pennsylvania, which refused. The Framers realized that the national government had to be located on federal land so that Congress could protect itself and so that no state could obtain undue influence over Congress.[2] This leads to one basic factual conclusion: "The capital district was to be a national commons. . . ." W Cobb,

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[1]FY 2004 Proposed Budget and Financial Plan, http://cfo.dc.gov/budget/2004/pbfp.shtm.

[2]*E.g.*, HOME RULE FOR THE DISTRICT OF COLUMBIA 1973-1974 BACKGROUND AND LEGISLATIVE HISTORY OF H.R. 9056, H.R. 9682, AND RELATED BILLS CULMINATING IN THE DISTRICT OF COLUMBIA SELF-GOVERNMENT AND GOVERNMENTAL REORGANIZATION ACT, COMM. ON DISTRICT OF COLUMBIA, 93RD CONG., 2D SESS. (Comm. Print 1973) (hereinafter "BACKGROUND"), 3577.

Democracy in Search of Utopia, 99 DICK.L.REV. 527, 528, 531 (1995).

The District relies on two factual assertions to support its argument for heightened scrutiny: 1) the asserted "universal" rule of taxing income at its source; and 2) the alleged Congressional discrimination and bias demonstrated by the asserted structural imbalance. Neither is correct.

The decision below is correct and need not be reviewed. In order to avoid duplication, Maryland incorporates the arguments of the United States and the Commonwealth of Virginia.

REASONS FOR DENYING THE WRIT

A. The Petition Does Not Present Any Compelling Reason For Further Review, As Required By Rule 10.

The District makes little or no effort to demonstrate how its petition satisfies the criteria for granting a writ of certiorari, as set forth in Rule 10. There is no conflict among the courts of appeals or State courts of last resort. Nor has the court below departed in any way from the accepted and usual course of judicial proceedings, especially in a manner that invokes this Court's supervisory power. Instead, the District relies solely on assertions of Congressional discrimination and bias or, alternatively, a purported "universal" rule of taxation, to support its request for review.

The District was created solely to serve federal purposes. The federal treasury should support the federal city and, in fact,

it does. Under the Revitalization Act of 1997[3], Congress provided unprecedented financial aid to the District. That statute expressly mandates that Congress carefully consider the impact of each federal restriction - - including the Congressional prohibition on a nonresident income tax - - when it determines how much federal money should be provided to the District.

As will be explained below, further review is unwarranted because the District's argument is little more than its expression of discontent with the unique status it occupies under the Constitution as the seat of our National government. Thus, the District's quarrel is not with the well-reasoned analysis of the lower courts in this case, but with the Constitution itself. Contrary to the District's suggestion, there is no universal rule that would authorize the District to impose taxes on nonresidents. As the lower courts correctly held, the prohibition on such taxes is not unlawful discrimination precisely because the Constitution renders the District unique and because it authorized Congress to adopt this, and other, policies for the governance of the federal city.

The District's position conflicts with precedent; the "universal" rule is inapposite; and the District occupies a unique status and is not subject to discrimination. Congress properly exercised its plenary power when it passed the Home Rule Act, and heightened scrutiny has no place in this analysis. There is no compelling reason to review the decisions below.

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[3]Title XI of the Balanced Budget Act of 1997, P.L. 105-33, at §11601(c)(1), known as the National Capital Revitalization and Self-Government Act of 1997, 111 Stat.712 (§§11000-11723)(1997)(the "Revitalization Act").

B. There Is No Need For Heightened Scrutiny Because The District's Argument Is Inconsistent With Precedent.

Tacitly conceding that it cannot prevail under a "rational relationship" standard, the District argues for heightened scrutiny of its challenge to the Home Rule Act. Its argument, however, is inconsistent with this Court's precedent holding that, under the Seat of Government clause, Congress has plenary power over the District as its "State" legislature. Congress has the same powers over the District that a State legislature has over subordinate units, and States can created subordinate governments with limited taxing power. Neither the alleged "universal" rule of taxing income at its source nor the asserted differential treatment of the *sui generis* entity known as the District, justify heightened scrutiny of the Home Rule Act, because the District's argument would, if accepted, lead to the conclusion that Congress has less power than a State legislature. That conclusion is inconsistent with established precedent, as set forth below.

Congress, in legislating for the District, has all the powers of a state legislature. *Loughborough v. Blake,* 18 U.S. 317, 318 (1820); *Gibbons v. D.C.,* 116 U.S. 404, 408 (1886); *Adams v. Clinton,* 90 F.Supp.2d 35, 34, 49 (D.D.C. 2000), *aff'd,* 531U.S. 940 (2000); *Firemen's Ins. Co. of Washington, D.C. v. Washington,* 483 F.2d 1323, 1327 (D.C.Cir. 1973); *District of Columbia v. American Federation of Government Employees,* 619 A.2d 77, 81 (D.C. 1993), *cert. denied,* 510 U.S. 933 (1993) ("AFGE").

The "Seat of Government," or "District," Clause, Art. I, § 8, cl. 17, gives Congress plenary power over the District. *Palmore v. U.S.,* 411 U.S. 389, 397 (1973); *Loughborough,* 18

U.S. at 317. In short, "the District of Columbia is a separate political community in a certain sense, and in that sense may be called a state; but the sovereign power of this qualified state is not lodged in the corporation of the District of Columbia, but in the government of the United States. Its supreme legislative body is congress." *Metropolitan R.R. Co. v. D.C.,* 132 U.S. 1, 9 (1889).

Unlike the States, the District government was created as a convenience to Congress. Because Congress was not required to create it, Congress was not compelled to delegate all powers of taxation to it. *See Marijuana Policy Project v. U.S.,* 304 F.3d 82, 83-84 (D.C.Cir. 2002); *see also Metropolitan,* 132 U.S. at 8; *Hunter v. City of Pittsburgh,* 207 U.S. 161, 178-79 (1907); *Williams v. Mayor of Baltimore,* 289 U.S. 36, 40 (1933); *U.S. ex rel. Columbia Heights Realty Co. v. Macfarland,* 32 App.D.C. 53 (1908).

The District's argument is logically flawed because it depends entirely upon the District's erroneous insistence that the federal city must be treated as a State. In fact, the District is not a State, but a municipal corporation. *Metropolitan,* 132 U.S. at 9. Thus, the inherent powers of the fifty sovereign states differ from that of an entity that was created, and could be abolished, by a simple act of Congress.

While Congress's powers vis-a-vis the States are constrained by the Tenth Amendment, Congress's power under the Seat of Government Clause is sweeping. For example, although the Congress may not constitutionally create Article I courts under its broad bankruptcy power, *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.,* 458 U.S. 50 (1982), it may do precisely that in the District under the Seat of

Government Clause, *Palmore*, 411 U.S. at 398, 410; *see AFGE*, 619 A.2d at 84 n. 7.

The District's argument presents an anomaly. While the District must admit that Congress's plenary power is equal to that of a State, and that State legislatures are not compelled to delegate the power to tax nonresident income to subordinate governments, the District asserts that Congress was compelled to delegate this power. Thus, the District posits that Congress, acting under the Seat of Government Clause, has less power than a State legislature; however, that proposition contradicts binding precedent. It cannot, therefore, support the District's request for review and heightened scrutiny.

C. There Is No Need For Review and Heightened Scrutiny Because The District's Status Is Intentionally Unique In Our Federal System And The Remedy For The Alleged Problem Has Already Been Provided By Congress

As the seat of the federal government, the District is unique. *See Firemen's Ins. Co.*, 483 F.2d at 1328; *Adams*, 90 F.Supp.2d at 46 n. 16. It obtains unique benefits, such as special federal appropriations, tourism, the Smithsonian, the White House, and the National Gallery, and it bears unique burdens, such as building height limitations, "exclusive" legislative jurisdiction in Congress, the Congressional veto,

absence of voting representation, restrictions on taxation, and, until modern times, the lack of the right to vote for President.[4]

The District government is "an executive agency of the Federal Government. . . ." P. Schrag, *The Future of District of Columbia Home Rule*, 39 CATH.L.REV. 311, 337, 340 (1990); *see*, *Commuter Tax: Hearings and Markups of the Subcomm. on the District of Columbia on H.R. 11303, H.R.* 10116, 95th Cong., 2d Sess.,181 (Stmt. of Rep Harris); BACKGROUND at 1442 (suggesting creation of "municipal government similar to that provided in all other cities. . . ."); *id.* at 1487 (same); *see Adams,* 90 F.Supp.2d at 47. In fact, in the Complaint at ¶17, the District describes itself as a "municipal corporation."

The decision below applied settled principles to unchallenged facts in the context of the Seat of Government Clause. In pertinent part, both lower courts simply held that strict or heightened scrutiny was inapplicable to what is a purely economic claim. Furthermore, the decisions below do not leave the District without a remedy. Instead, they point the District

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[4]This unique status is well-illustrated by the District's "long arm statute." If an out-of-state person transacts business in Maryland, that person is subject to long arm jurisdiction, MD. CODE ANN., CTS. & JUD. PROC. § 6-103(b); however, if a person enters the District to do business with the federal government, the "government contacts exception" prohibits the exercise of personal jurisdiction. *Naartex Consulting Corp. v. Watt,* 722 F.2d 779, 786-87 (D.C. Cir. 1983), *cert. denied,* 467 U.S. 1210 (1984). It is simply not reasonable for the District to assert personal jurisdiction on the same terms as the fifty states, because people have no choice but to transact federal business in the District.

to the single and proper route for redress: to Congress through the Revitalization Act.

D. There Is No Need For Heightened Scrutiny Because The "Universal" Rule Posited By The District Is Inapposite; It Applies Only To States, And The District Is Not A State.

The alleged "universal" rule of taxing income at its source, upon which the District's claim is founded, does not exist in the form described by the District. There is no "universal" rule of taxing income at its source, at least as framed by the District. For example, Maryland does not tax the wage income of District residents who are employed in Maryland. MD. CODE ANN., TAX-GEN. § 10-210(e), §1-101(u)(2); *Commuter Tax: Hearings and Markup Before the Subcomm. on Fiscal Affairs and the Comm. on the District of Columbia on H.R. 11579 and H.R. 14621*, 94th Cong., 2d Sess.176 (1976).[5]

In the seminal case, this Court held that "States" have the power to tax nonresident income. *Shaffer v. Carter*, 252 U.S. 37 (1920). The Court specifically rested this decision on the "fundamental principles" that "the states have general dominion, and, saving as restricted by particular provision of the federal Constitution, complete dominion over all persons, property, and business within their borders." *Id.* at 49. Thus, as "an incident of sovereignty," which the District lacks, "[S]tates

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[5]Maryland taxes business income under TAX-GEN. § 10-210(b)(2). Maryland citizens operating unincorporated businesses in the District are taxed by the District. *Roach v. Comptroller*, 327 Md. 438, 440-41, 610 A.2d 754, 755 (1992); D.C. CODE ANN. §§47-1808.01, *et seq.*

have full power to tax. . . ." *Id.* (citation omitted). The District's reliance on an alleged "universal" principle to support its heightened scrutiny argument is misplaced.[6] It is a city, not a sovereign State. To the extent to which there is a "universal" rule, it is inapposite.

Local governments do not have a State's inherent powers of sovereignty. For example, local governments in Maryland do not have the inherent power to tax nonresident income: "Since the power to tax is an inherent attribute of sovereignty and since a County is only an agency or subdivision of the State, it is fundamental that the power of a County (or County Board of Commissioners) to tax is not inherent but is a delegated power and exists only when and to the extent granted by the State. The authority of a municipality to tax is similarly a delegated power." *Griffin v. Anne Arundel County,* 25 Md.App. 115, 126, 333 A.2d 612, 619, *cert. denied,* 275 Md. 749 (1975). This description of delegated powers states the accepted rule.

Diligent research has not disclosed any authority suggesting that a municipality automatically acquires the inherent power to impose a nonresident income tax when it receives home rule. *Compare City of N.Y. v. State of N.Y.,* 94 N.Y.2d 577, 582, 730

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[6]Many states waive the power to impose nonresident taxes. II J. Hellerstein and W. Hellerstein, State Taxation, ¶20.10[6](Warren Gorham & Lamont 3d ed. 2000). Thus, while Maryland is one of the 41 states that "authorizes" nonresident income taxes, Maryland does not impose those taxes on the wages of residents of any reciprocal jurisdiction, TAX-GEN. §§10-210(e), 1-101(u)(2), including the District. This further erodes the "universality" concept as a factual predicate for heightened scrutiny.

N.E.2d 920, 924 (2000)(delegating authority), *with Weekes v. City of Oakland,* 21 Cal.3d 386, 390, 579 P.2d 449, 450 (1978)(withholding authority).

The District is not a State. It is a municipality. (Complaint at ¶17). It has no inherent powers and cannot claim to have any taxing authority beyond that delegated by Congress. Thus, the "universal" rule is not applicable to cities such as the District. The prohibition on nonresident personal income taxation is well-within the "norm." The "universal" rule does not suggest a need for review or for heightened scrutiny.[7]

E. There Is No Need For Heightened Scrutiny Because The Congressional Limitation On The Taxing Power Of Its Subordinate Is Not Unlawfully Discriminatory, Nor Was It The Product Of Bias; It Reflects Congress' Considered Judgment On A Matter Of Policy

The District posits that this is a case about "discrimination" by Congress. Likely because it recognizes that any differential treatment is grounded on the Seat of Government Clause, the District apparently concedes that this alleged discrimination survives "rational relationship" analysis and, instead, urges heightened scrutiny.

"Discrimination" is no more than differential treatment. There is a distinction between unfair discrimination and discrimination that is not unfair. *See In Re Bentley,* 266 B.R.

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[7]As mandated by Rule 15.2, Maryland disputes the assertions by the District.

229, 237 (1st Cir. 2001) (describing provision of bankruptcy code). As the First Circuit noted:

> "To discriminate," in its broadest sense, is to make a distinction or to note a difference between two things. *Derivatively, it is to treat two things differently on account of a distinction between them.* Accordingly, in [bankruptcy code] §1322(b)(1), to discriminate is simply to treat two classes differently on the basis of a difference between them; the difference in treatment need not be unfair, wrongful, or even adverse to a class in order to constitute discrimination within the meaning of this statute. The treatment need only be different.

Id. (dictionary definitions in footnotes omitted) (emphasis added).

"Discrimination is the use of some criterion as a basis for a difference in treatment." *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1067 (9th Cir. 2002). It is, in and of itself, not wrongful. In the context of civil rights laws, "discrimination" becomes unlawful only when it is based on forbidden criterion, such as race, religion, or gender, and when it results in disadvantageous treatment. *Id.*

The District is treated differently in many respects. District residents, unlike the residents of the fifty states, cannot elect voting representatives to Congress. In *Adams*, this Court held that that difference - or, in the District's terms, that "discrimination" - was lawful. *Adams*, 90 F.Supp.2d at 46-72. And, until recent times, District residents could not vote for president; surely a discrimination, but one that was lawful. Similarly, while any of the fifty states may legislate on

marijuana, the District cannot. That is discrimination, *i.e.*, different treatment; however, it was held to be both lawful and proper. *Marijuana Policy Project v. U.S.*, 304 F.3d 82 (D.C. Cir. 2002). Congress has controlled the hours that swimming pools were open and regulated meters in taxis in the District. While those controls and regulations were lawful, Congress could not have imposed the same regulations on the states. It was discrimination, in the non-pejorative sense, and it was lawful. Similarly, in *U.S. v. Cohen*, 733 F.2d 128 (D.C.Cir. 1984), a distinctive, or discriminatory, Congressional statutory system was upheld against an equal protection challenge.

The prohibition does not single the District out. *See* U.S. Const., Art. 1, §8, cl. 17 (forts, arsenals, dock yards, and other needful buildings). Just as the Home Rule Act prohibits certain taxation by the District, federal law prohibits State taxation on military installations. 50 U.S.C. §§501, 574. Maryland cannot tax: Fort Meade, sales made at Patuxent Naval Air Station, the two United States Courthouses, Andrews AFB, Aberdeen Proving Grounds, Fort Dietrich, the income of federal service men and women earned in Maryland, 50 U.S.C. §§501, 574, or of Congressional representatives who live in Maryland, *U.S. v. Maryland*, 488 F.Supp. 347, 348 (D.Md.), *aff'd*.636 F.2d 73 (4th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981). While the impact may be proportionately greater on the District, the Revitalization Act established a mechanism to compensate the District.

Thus, to state that this is a case about discrimination means only that, in the context of taxing nonresident income, the District is allegedly treated differently than other non-comparable entities - - States - - on account of differences between them. Even if, *arguendo*, correct, that is not, in this context, wrongful. Instead, it is an incident of the basic

framework of the United States Constitution. The District is *sui generis*. The differential treatment does not support a need for review or heightened scrutiny. And, because of the payments made pursuant to the Revitalization Act, the District is compensated for that differential treatment. That mechanism is explained more fully in Part F, below.

The District repeatedly asserts, however, that the prohibition was the product of bias and, specifically, that the voting delegations from Maryland and Virginia were biased against the District. In short, the District asserts that the Maryland and Virginia delegations voted to impose the prohibition in order to benefit their own citizens at the cost of their fellow citizens in the District. The District's three-decade delay in making this claim is telling. In fact, the late Senator Charles Mathias explained the rationale for the prohibition: "The increased Federal payment (to the District) also compensates for the Congress' refusal to permit the District to levy taxes on the income of nonresidents." *Bishop v. D.C.*, 411 A.2d 997 (1980), quoting 117 CONG. REC. 42502. Sen. Mathias' view is consistent with that of Sen. Edward Kennedy, who proposed "that any restrictions on the District's ability to raise revenue from local sources be fully recognized and accounted for in the computation of the Federal financial commitment to the District." *Hearing Before Committee on the District of Columbia on S. 1435*, U.S. Sen., 93d Cong., 1st sess., at 113. Congressional representatives repeatedly stated that, because the District is a federal city, its budget should be supported by the federal government. BACKGROUND at 1123. In short, the decision to impose the prohibition was supported by constitutionally-grounded policy arguments that the federal government should pay the cost of governing the federal city, a city created to serve a unique federal purpose, and that decision was not the product of bias. Thus, to quote Congressman

Diggs, the successful home rule bill was a "reasonable and rational accommodation of the interests of all Americans in their Nation's Capitol. . . ."[8] BACKGROUND at 1507-21. If the appropriations are insufficient, the remedy is to use the mechanism created by the Revitalization Act. The "discrimination" and bias arguments should be rejected. The prohibition on nonresident income taxation reflects Congress's considered judgment on a matter of policy. Decisions under the Seat of Government Clause should not be subjected to heightened scrutiny.

F. Congress Has Created a Mechanism To Compensate The District and Equity Does Not Suggest a Need For Review or Compel Heightened Scrutiny

Because Congress created a mechanism to compensate the District for all federally-imposed restrictions, heightened scrutiny is not proper. The District's argument focuses on only one aspect of the Home Rule Act.

The federal city belongs to the United States as a whole and, if the combination of local tax revenues plus federal support is insufficient to meet legitimate needs, the cost should not be imposed on any subset of citizens, but on the entire

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[8]The analysis in the text, above, refutes the District's *unsupported* contentions that the real reason Congress decided to forbid the District from taxing nonresident income is that members of Congress wanted to benefit their constituents at the expense of the District. Congress had sound policy reasons supporting its action, not the least of which was the creation of statutory mechanisms to compensate the District.

Nation that benefits from having the District as the seat of the national government. Congress expressly recognized this principle by creating a statutory mechanism to compensate the District for the costs imposed by the federal government. Instead of using that mechanism, the District seeks to impose the costs of its local government on all nonresident taxpayers, in addition to the funds those taxpayers already contribute to the District through the Revitalization Act. In short, the District asks that some of its fellow citizens be *twice* taxed to support the District, and its entire argument of discrimination and bias is narrowly focused on the subsection of the Home Rule Act that contains the prohibition, while glossing over the compensatory mechanism in the Revitalization Act.

The duplicative taxation that would result from the District's proposal is easily described. Because of the tax credit system, a nonresident income tax is, in fact, a tax upon those taxpayers who do *not* commute into the District. If the District prevails, non-commuting citizens will pay most of the nonresident income tax, and they will also pay a second time through their federal tax dollars that fund the "bailout" of the District under the Revitalization Act. The plaintiffs are requesting that all Maryland taxpayers shoulder a federal burden, imposed by Congress to further federal interests, because some Maryland residents commute to the District to do

business with the federal government that is located there.[8] They make this request because Congress does not appropriate as much money as the District thinks it should, and even though it was Maryland's gift that conveyed the very land upon which the District sits.

Maryland supports the legitimate goals of its fellow citizens in the District to have adequate public services. No states benefit more from a healthy District than Maryland and Virginia. Maryland, however, differs from the District in its analysis of the alleged problem[9] and the solution. The District's Complaint is a misplaced policy argument framed in legal terms. Congress rejected the District's position because it

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[8] *Commuter Tax, Hearings and Markups of the Subcommittee on Fiscal and Gov't. Affairs and the Committee on the District of Columbia on H.R. 11303 and H.R. 10116* (to repeal the prohibition and to impose a nonresident income tax) 95th Cong., 2d sess. (1978)(hereinafter "Repeal"), at 195 (Stmt. of Rep Spellman; "[T]hey would be paying twice."), 179, 182-83 (Stmt. of Rep. Harris); *Commuter Tax, Staff Study and Report for the Subcommittee on Fiscal Affairs of the Committee on the District of Columbia,* 94th Cong., 2d Sess. (hereinafter "*Staff Study*"), at 28; *Commuter Tax, Hearings and Markup before the Subcommittee on Fiscal Affairs and the Committee on the District of Columbia on H.R. 11579 and H..R. 14621*, 94th Cong., 2d Sess. (hereinafter "1976 Hearings") at 173 (Stmt. Of Lt. Gov. Lee: "[T]he loss would be sustained not by the suburban commuters but by the treasury of the State of Maryland. This thing. . . is a tax on the State of Maryland.").

[9] Maryland does not mean to imply that the United States has failed to meet its obligations. Instead, Maryland assumes, as it must, FED.R.CIV.P. 12(b)(6), the facts alleged.

would create inequities, especially in light of the existing statutory mechanism to redress the alleged wrong.

In order to alleviate the burdens of being the Nation's Capital, the District receives substantial federal funding. (Complaint at ¶¶39). Thus, because of the District's unique role in assuring the independence of the national government, the Home Rule Act created a mechanism to compensate the District. When it enacted the prohibition, Congress also provided for regular payments "to cover the proper share of the expenses of the District government." *Hearing Before the Comm. on the District of Columbia on S. 1435,* 93rd Cong., 1st Sess., 64.

That compensatory mechanism[10] has since changed. In the Revitalization Act, Congress found that its building height restrictions, its limitations on the District's ability to tax income, and the unique status of the District as the seat of government, play a "significant role in causing the relative tax burden on District residents to be greater than the burden on residents in other jurisdictions in the Washington, D.C. metropolitan area. . . ." Congress then, in §11601(c)(2), authorized a "Federal contribution towards the costs of the operation of the government in the Nation's capital" of $190,000,000 in FY 1998 and an amount to be determined for each subsequent year. Congress stated: "In determining the

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[10]The Revitalization Act was intended to "address funding mechanisms" and "provide mechanisms" for resolving the District's problems. C. Palmer, *Waiting for Democracy: Congress, Control Boards, and the Pursuit of Self-Determination in the District of Columbia*, 19 HAMLINE J. PUB. L. & POL'Y 339, 339 (1991) (citation omitted).

amount appropriated pursuant to the authorization under [11601(c)(2)], Congress shall take into account the findings described in paragraph (1)," including the prohibition.

The Revitalization Act was designed to "resolve the city's cash shortfall. . . ." The President's National Capital Revitalization and Self-Government Improvement Plan, 1997 WL 12985. "[T]he United States came to the rescue of Washington, D.C. . . ." C. Palmer, *Waiting for Democracy: Congress, Control Boards, and the Pursuit of Self-Determination in the District of Columbia*, 19 HAMLINE J. PUB. L. & POL'Y 339, 339 (1991). The statute was a "highly technical bailout. . . ." *Id.* "Millions of dollars were injected into the City's lagging budget." *Id.* at 345-46.

President Clinton stated that the purpose of the Revitalization Act was to *"remove from the District of Columbia the burdens that are normally borne by a state. . . ."* *Id.* at 363 (emphasis added)(citation omitted). The Federal Government assumed control over many vital city functions, such as courts, prisons, and administration of Medicaid payments. *Id.* at 345-46. The District's $4.8 billion pension shortfall was transferred to the United States. *Id.* at n. 88; Revitalization Act at §11002(b)(2).

In short, in the Revitalization Act, Congress identified the federal causes of the District's problems and acted to address the same financial issues of which the District now complains. Federal taxpayers assumed more than $5 billion of the District's obligations. Maryland citizens must pay their share of that bailout.

The District repeatedly asserts that the current situation is unfair; however, it fails to demonstrate that equity provides the

applicable constitutional standard. Furthermore, it is far from clear that equity is the District's ally. The District, complaining of taxation without representation, seeks to double tax the unrepresented citizens of the fifty States, who have no choice but to enter the District on federal business.

As the District has repeatedly acknowledged, the source of its grievance lies in the Constitution and Congress. The District points to, for example, its Constitutionally-fixed borders, Congressionally-imposed building height limitations, the Congressional limitation on taxing nonresidents, and its federally-imposed inability to tax federal property. *E.g.*, Repeal at 129; *Staff Study* at 28. Congress, itself, has specifically addressed these same factors. Revitalization Act, §11601(c)(1)(A - D). In short, the "major reason for the District's limited tax base is the restrictions imposed on it by the Federal Government. . . ." Repeal at 180 (Stmt. of Rep. Harris). Thus, if there is a revenue shortfall, it has been caused by federal laws. *But see* Balanced Budget Act of 1997 at §11301 (chronicling District's historically poor record of determining and collecting tax revenue due to it); Complaint at ¶40 (District's inefficiency).

Nevertheless, the District asserts that "fairness" dictates that Maryland taxpayers reimburse the District for these federally-imposed costs. The District's constitutional argument would lead to imposition of double taxes on nonresidents, because Congress has already established a funding mechanism in the Revitalization Act. At bottom, the District's argument is with Congress; however, the District seeks the power to tax Maryland, rather than addressing the appropriate funding source.

Thus, contrary to the District's suggestion of Congressional bias, the prohibition evidences Congressional intent that the United States should pay for the needs of the Capital. The reason for enactment of the prohibition has been simply stated:

> Senator Charles Mathias elucidated the rationale for enacting the prohibition found in §602(a)(5) of the Act: "The increased Federal payment (to the District) also compensates for the Congress' refusal to permit the District to levy taxes on the income of nonresidents."

Bishop, 411 A.2d at 998. (citation omitted).

One may argue, as the District does, that Congress is not properly responding to the District's requests and needs; however, a mechanism exists to compensate the District for the imposition of the prohibition on nonresident income taxes, the District has used, or is free to use, that mechanism, and its requests for compensation have been addressed by Congress.

As one commentator observed:

> Certainly, suburban commuters benefit[11] from not paying a commuter tax. But such a benefit results from Maryland and Virginia having given 10 square miles of land to the country in 1789. All fifty states share land that once belonged to the citizens of Maryland. To place the financial burden of the District of Columbia on the shoulders of suburban commuters is akin to saying, "Thank you for the land, we assume you will continue to be responsible for its maintenance." The District of Columbia is the capital of the entire nation, and all fifty states should share the cost of resolving its problems.

D. Florenzo, *DCERA: A Solution to the District of Columbia's People Problem*, 86 GEO. L.J. 181, 194 (1997); *accord* Repeal at 190 (Stmt. of Rep. Holt); 1976 Hearings at 173 (Stmt. of Montgomery County Executive); *id.* at 164 (Rep. Holt).

Because the District's complaints are based on federal statutes and the United States Constitution, it "should look to the residents of all 50 States to redress the consequences of

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[11]While the District complains of the costs imposed by commuters, "District business growth is constrained by lack of an adequate workforce. . . ." Richard Monteilh, *Testimony Before H. Approp. District. Subcomm.*, 2001 WL 2007413, at *2 (Apr. 26, 2001) (available at www.dcwatch.com/govern/econ010426d.htm). Commuters create jobs for District residents. 1976 Hearings at 185. The District vigorously opposes efforts to reduce its role as the Capital. Democracy, 99 Dick.LRev. at 563, 570, 590; R. Monteilh, Testimony, 2001 WL 2007413 *2. It is inconsistent to assert that commuters impose a burden while simultaneously seeking more commuters.

these restrictions. . . ." Repeal at 180 (Stmt. of Rep. Harris); BACKGROUND at 1123 (Stmt. of Rep. Gude: "to the extent that there is a deficit in the [District] budget to be made up by the citizens of the whole country, this is a Federal city and I think it is a Federal responsibility.").

G. Summary

The prohibition against taxation of nonresident income is the product of sound policy, not discrimination or bias. If the District believes that policy is implemented unfairly, it should petition its legislature - - the Congress. That entity has, within its plenary power, created a mechanism to redress any legitimate grievance.

CONCLUSION

For the reasons stated, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

MICHAEL D. BERMAN*
Deputy Chief of Litigation
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6345

*Counsel of Record

Attorneys for the State of Maryland

(2)

No. 05-970

In the Supreme Court of the United States

JAMES M. BANNER, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
MARK B. STERN
MICHAEL S. RAAB
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

Exercising its plenary authority to legislate for the District of Columbia, Congress enacted D.C. Code § 1-206.02(a)(5) (2001), which prohibits the District of Columbia Council from imposing a tax on the personal income of nonresidents. The questions presented are:

1. Whether that provision discriminates against District residents in violation of the equal protection component of the Fifth Amendment.

2. Whether the provision violates the Uniformity Clause of the Constitution.

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In the Supreme Court of the United States

No. 05-970

JAMES M. BANNER, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 428 F.3d 303. The opinion and order of the district court (Pet. App. 19a-64a) are reported at 303 F. Supp. 2d 1.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17a-18a) was entered on November 4, 2005. The petition for a writ of certiorari was filed on February 2, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 1-206.02(a)(5) of the D.C. Code prohibits the District of Columbia Council (D.C. Council) from imposing a personal income tax on persons who do not reside within its borders. Petitioners (certain District of Columbia taxpayers, the District of Columbia, the D.C. Council, the members of the Council, and the Mayor of the District of Columbia) filed suit against the United States and the Attorney General, challenging that restriction. Pet. App. 65a-91a. Petitioners alleged, *inter alia*, that the restriction violates the equal protection component of the Due Process Clause and the Uniformity Clause of the Constitution, Amend. V, Art. I, § 8, Cl. 1. See Pet. App. 83a-87a.

The State of Maryland and the Commonwealth of Virginia intervened as defendants, and the federal defendants and the intervenors moved to dismiss the complaint. Pet. App. 5a. The district court granted those motions. *Id.* at 19a-64a.

The district court held that the equal protection component of the Fifth Amendment is not implicated because District residents are not similarly situated to nonresidents who work in the District. Pet. App. 44a-50a. The court alternatively held that, even if the equal protection component of the Fifth Amendment were implicated, the prohibition on taxing non-residents would not be subject to heightened scrutiny and would readily withstand rational-basis review. *Id.* at 45a-58a.

The district court also held that the Uniformity Clause does not limit Congress's power under the District Clause (U.S. Const. Art. I, § 8, Cl. 17) to enact local laws applicable to the District. Pet. App. 58a-61a. The court alternatively held that even if the Uniformity

Clause were applicable, the prohibition against taxing non-residents is a permissible means of addressing a geographically isolated problem. *Id.* at 61a.

2. The court of appeals affirmed. Pet. App. 1a-16a. The court rejected petitioners' contention that strict scrutiny is required because the restriction on taxing non-District residents discriminates against District residents. *Id.* at 6a-11a. The court noted that the Constitution gives Congress plenary authority to legislate for the District, *id.* at 9a, and it concluded that petitioners' claim amounted to a dispute "with the plan of the Constitution and the judgment of its Framers." *Id.* at 10a. The court also held that the restriction easily satisfies rational basis review. *Id.* at 11a. The court explained that "Congress may have been concerned that a commuter tax would cause District businesses to relocate to nearby Maryland and Virginia, where income tax rates are generally lower," * * * [o]r it may have decided that the enhanced burden of financing the District's operation should fall on the nation at large, rather than on the residents of neighboring sta[illegible]." *Ibid.*

The court of appeals also rejected petitioners' claim that the restriction on taxing non-District residents violates the Uniformity Clause because it prefers the States at the expense of the District. Pet. App. 12a-15a. The court explained that petitioners' argument "is inconsistent with Congress's constitutional authority over the District." *Id.* at 14a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. The Constitution gives Congress power "[t]o exercise exclusive Legislation in all Cases whatsoever" with respect to the District of Columbia. U.S. Const. Art. I, § 8, Cl. 17. Under that grant of authority, Congress may not only apply statutes of nationwide application to the District, but it "may also exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes." *Palmore* v. *United States*, 411 U.S. 389, 397 (1973). The restriction on the D.C. Council's authority to tax the personal income of non-District residents falls squarely within Congress's constitutional authority to legislate for the District.

2. Petitioners contend (Pet. 18-23) that the restriction at issue here triggers strict scrutiny under the equal protection component of the Due Process Clause because it discriminates against District residents and in favor of non-District residents. In support of that contention, petitioners rely (Pet. 19) on decisions of this Court that have invalidated *State* taxes that discriminated against *non-residents* of the State.

Petitioners' reliance on those cases is misplaced. When Congress legislates with respect to the District, its treatment of District residents is not comparable to a State's treatment of non-residents. To the contrary, because Congress has exclusive legislative authority over the District (U.S. Const. Art. I, § 8, Cl. 17), "when it legislates for the District, [it] stands in the same relation to District residents as a state legislature does to residents of *its own* state." Pet. App. 9a. Just as state legislation that singles out state residents for taxation raises no equal protection concerns, congressional legislation that singles out District residents for taxation raises no equal protection concerns.

More generally, equal protection principles require only that similarly situated persons be treated alike. *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). Under the structure of the Constitution, residents of the District and non-District residents are not similarly situated. As the district court explained, "the residents of the District are treated under the Constitution as a distinct class that is not comparable to any other group of citizens." Pet. App. 45a.

Nor does petitioners' equal protection claim gain force from the fact that District residents do not vote for Members of Congress. Instead, as the court of appeals explained, under the Constitution's structure, "Congress is the District's government, * * * and the fact that District residents do not have congressional representation does not alter that constitutional reality." Pet. App. 10a. At bottom, petitioners' plea for strict scrutiny in this context cannot be reconciled "with the plan of the Constitution and the judgment of its Framers." *Ibid.*

To the extent that any equal protection analysis is warranted in this context, the relevant inquiry is whether Congress had a rational basis for prohibiting the D.C. Council from imposing taxes on non-District residents. That standard is easily satisfied here. As the court of appeals explained, Congress may have imposed a restriction on taxing non-District residents because it was concerned that such a tax might cause District businesses to relocate, or because it concluded that the additional money necessary to fund the District should come from the Nation as a whole, rather than from the residents of neighboring States. Pet. App. 11a.

3. Petitioners' claim based on the Uniformity Clause (Pet. 24-26) is equally without merit. The Uniformity Clause provides that "Congress shall have Power To lay

and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. Const. Art. I, § 8, Cl. 1.

Because Congress has authority to legislate separately for the District, the Uniformity Clause can have little or no application to such legislation. As the court of appeals explained, "[g]iven Congress's authority under the District Clause, the Uniformity Clause would appear to have little relevance to Congress's local taxation of the District." Pet. App. 13a.

Relying on *Binns* v. *United States*, 194 U.S. 486 (1904), petitioners contend (Pet. 24-26) that the Uniformity Clause limits Congress's authority to enact legislation for the District. In that case, however, the Court held that the United States could commingle tax revenue generated in the then-territory of Alaska with other funds in the Treasury. 194 U.S. at 494. That holding provides no support for petitioners' argument here. Petitioners rely on the Court's statement in dicta that a different result might obtain in a case in which "Congress is, by some special system of license taxes, seeking to obtain from a territory of the United States revenue for the benefit of the nation, as distinguished from that necessary for the support of the territorial government." *Id.* at 496. But that dicta does not assist petitioners. As the court of appeals explained, the restriction at issue here "does not generate surplus tax revenue beyond the needs of the District for the benefit of the nation." Pet. App. 14a. To the contrary, the restriction "raises no revenue at all." *Ibid.* Moreover the taxes the District *does* raise, within the limits imposed by Congress, are

used to support the District Government, not the Nation as a whole.

Even if the Uniformity Clause applied to the restriction on taxation of non-District residents, that Clause "'does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems." *United States* v. *Ptasynski*, 462 U.S. 74, 83-84 (1983) (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 159 (1974)). The restriction on taxation of non-District residents reflects Congress's recognition that the District of Columbia is the capital of the Nation as a whole, that it has unique attributes as a result, and that responsibility for funding the District Government should not fall disproportionately on Maryland and Virginia.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
MARK B. STERN
MICHAEL S. RAAB
Attorneys

APRIL 2006

(6)

No. 05-970

IN THE
Supreme Court of the United States

JAMES M. BANNER, JR., *ET AL.*,
Petitioners,

v.

THE UNITED STATES OF AMERICA, *ET AL.*,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

WALTER SMITH
DC Appleseed Center for Law and Justice
1111 14th St. NW, Suite 510
Washington, DC 20005
202-289-8007

Counsel for Petitioners District of Columbia, Mayor Anthony Williams, District Council, and Individual Council Members

JOHN W. NIELDS, JR.
Counsel of Record
JOHN F. STANTON
Howrey LLP
1299 Pennsylvania Ave. NW
Washington, DC 20004
202-783-0800

GARY THOMPSON
Gilbert Heintz & Randolph, LLP
1100 New York Ave. NW
Washington, DC 20015
202-772-2291

CAROLYN LAMM
White & Case, LLP
701 13th St. NW
Washington, DC 20005
202-626-3605

Counsel for Individual Petitioners

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Petitioners respectfully submit this Reply to the Opposition Briefs submitted by the Federal Respondents and by the States of Maryland and Virginia.

A. THE EQUAL PROTECTION/DUE PROCESS CLAIM

1. The Federal Respondents argue that District residents are not "similarly situated" to non-residents when it comes to *local* income taxes; and that a claim under the equal protection component of the Due Process Clause must therefore fail at the threshold. *See* Fed. Opp. at 5.

This argument is contradicted by numerous prior decisions of this Court. This Court has struck down on equal protection grounds numerous *local* tax laws simply because they treated residents and non-residents unequally. *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562, 572 (1949); *WHYY, Inc.* v. *Glassboro*, 393 U.S. 117, 118-19 (1968); *Metro Life Ins. Co.* v. *Ward*, 470 U.S. 869 (1985); *Williams* v. *Vermont*, 472 U.S. 14 (1985). Indeed, in *Wheeling Steel Corp.* v. *Glander*, *supra*, the Court struck down a tax that treated residents and non-residents unequally, stating explicitly that "the inequality is not because of the slightest difference in Ohio's relation to the decisive transaction, but solely because of *the difference in residence*." *Id.* at 572 (emphasis added).

Under this Court's decisions, residents and non-residents are "similarly situated" for equal protection purposes when they engage in identical taxable transactions within the taxing jurisdiction.

2. Next, the Federal Respondents argue that it is the structure of the *Constitution* that results in the

discrimination, and that Petitioners are therefore quarreling with the Constitution itself. *See* Fed. Opp. at 5. This is utter nonsense. The *Constitution* gives Congress the *power* to tax *both* residents and non-residents on the income they earn in the District.[1] It is *Congress* that decided to exempt non-residents and to tax only District residents. It is *Congress* that decided to shift tax burdens away from its voting constituents and place those tax burdens on the backs of non-voting District residents. And it is *Congress* that created an income tax scheme under which District residents pay the highest state and local taxes in the country. The Constitution did none of these things.

3. Congress undoubtedly decided to shift tax burdens away from its voting constituents and onto District residents because the members of Congress pay no political price for doing so: District residents do not vote. Thus, as this Court explained in *McCulloch* v. *Maryland*, 17 U.S. 316, 428 (1989) (Marshall, C.J.), "the only security against the abuse of [the taxation] power ... is the influence of the constituents over their representative" through the power to vote. Non-voters are normally given effective protection against abusive taxation through the requirement that they be treated *the same* as voters. That was this Court's point in *Loughborough* v. *Blake*, 18 U.S. 317, 325 (1820) (Marshall,

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[1] State legislatures have the power to impose their income taxes on both residents and non-residents who earn income within their borders. *See Shaffer* v. *Carter*, 252 U.S. 37 (1920). And the same power is plainly possessed by the United States Congress under the District Clause. *Gibbons* v. *District of Columbia*, 116 U.S. 404, 407 (1886) (Congress may impose taxes under its District Clause powers" in like manner as the legislature of a state").

C.J.) (federal tax on the District upheld because "the principle of *uniformity* . . . secures the District from oppression in the imposition of indirect taxes") (emphasis added).

Where, however, Congress treats non-voters differently from voters, the non-voters lose their protection from unfair taxation. That is what has happened here. And that is why scrutiny is appropriate. This is the fundamental point made in our Petition. None of the Respondents answer this point anywhere in their briefs.[2]

B. THE UNIFORMITY CLAUSE CLAIM

1. Contrary to the contention by the Federal Respondents (Fed. Opp. at 6), the Uniformity Clause applies squarely to the District. *Loughborough* v. *Blake*, 18 U.S. 317, 319 (1820) ("The District of Columbia . . . is not less within the United States, than Maryland or Pennsylvania" for uniformity clause purposes).

The Uniformity Clause was placed in the Constitution to prevent the possibility that Congress might impose "unequal tax burdens." It was placed in the Constitution to prevent the possibility that Congress would "relieve its constituents at the expense of other people." *See*

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[2] The Commonwealth of Virginia argues that Petitioners lack standing. This claim was correctly rejected by the Court of Appeals. *See* Petn at App. 6a n.28. A member of a disfavored class always has *standing* to raise an equal protection clause claim. *Id.*; *Orr* v. *Orr*, 440 U.S. 268, 273 (1979).

Petn at 25. That of course is just what Congress has done here.

2. The Federal Respondents argue that the Uniformity Clause has little or no application to *local* taxation. However, *Binns* v. *United States*, 194 U.S. 486 (1904), establishes that the Uniformity Clause applies to a *local* tax law where the local tax law Congress has enacted is one designed "for the benefit of the nation, as distinguished from [one] necessary for the support of the [local] government." And that is precisely what has been alleged here. Thus, the Complaint alleges at ¶ 7 that "the Prohibition takes over $30 billion in taxable income that would be taxable by the District under the universal 'income-source' rule, and gives it instead to Virginia, Maryland and other states to tax." App. 69a. The Prohibition harms the District, and is plainly designed for the benefit of other parts of the nation.

None of the Respondents answers this point.

* * * * *

Departing from the universal principle of income taxation, Congress has discriminated between residents and non-residents in the taxation of income earned in the District. Congress has decided to give its voting constituents a tax break, and to exempt them from contributing their fair share of the costs they impose on the District where they work. As a result, non-voting District residents pay the highest state and local taxes in the nation.

Given our country's history and its Constitutional jurisprudence, this burdensome and discriminatory treatment of a class of people who lack the right to vote raises serious and important issues. Moreover, the Prohibition jeopardizes the ongoing financial health of the Nation's Capital. This point is made in, and underscored by, the *amicus* brief submitted in support of the petition by the District of Columbia Chamber of Commerce, the Federal City Council, the Federation of Citizen Associations of the District of Columbia, the Washington D.C. Federation of Civic Associations, the District of Columbia Affairs Section of the District of Columbia Bar and many former Presidents of the D.C. Bar. None of the Respondents disputes this at all.

We respectfully request that the petition be granted.

Respectfully submitted,

JOHN W. NIELDS, JR.
Counsel of Record
JOHN F. STANTON
Howrey, LLP
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 783-0800

GARY THOMPSON
Gilbert Heintz & Randolph, LLP
1100 New York Avenue
Washington, D.C. 20005
(202) 772-2291

CAROLYN LAMM
White & Case, LLP
701 Thirteenth St. N.W.
Suite 600 South
Washington, D.C. 20005
(202) 626-3605

Counsel for Individual Petitioners

WALTER SMITH
D.C. APPLESEED CENTER FOR LAW AND JUSTICE
733 Fifteenth St., N.W., Suite 300
Washington, DC 20005
(202) 393-1158

Counsel for Petitioners District of Columbia, Mayor Anthony Williams, District Council, and Individual Council Members

April 18, 2006

(4)

No. 05-970

In the Supreme Court of the United States

JAMES M. BANNER, JR., *ET AL., Petitioners,*

v.

THE UNITED STATES OF AMERICA, *ET AL., Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMICI CURIAE DISTRICT OF COLUMBIA CHAMBER OF COMMERCE, FEDERAL CITY COUNCIL, DISTRICT OF COLUMBIA AFFAIRS SECTION OF THE DISTRICT OF COLUMBIA BAR, *ET AL.*, IN SUPPORT OF PETITIONERS

Of Counsel:
JON S. BOUKER
Arent Fox PLLC

JAMES S. BUBAR
CHARLOTTE BROOKINS-HUDSON
Co-Chairs, District of Columbia Affairs Section of the District of Columbia Bar

JOSEPH A. RIESER, JR.
Counsel of Record
JOSEPH R. PRICE
Arent Fox PLLC
1050 Connecticut Ave., N.W.
Washington, DC 20036
202-857-6000

Attorneys for Amici Curiae

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LIST OF AMICI CURIAE[1]

District of Columbia Chamber of Commerce; The Federal City Council; District of Columbia Affairs Section of The District of Columbia Bar; Sara-Ann Determan; Jamie S. Gorelick; Shirley Higuchi; David Isbell; George Jones; Robert E. Jordan Iii; Philip Allen Lacovara; Myles V. Lynk; Andrew Marks; John Payton; Stephen J. Pollak; E. Barrett Prettyman, Jr.; Daniel R. Rezneck; Pauline A. Schneider; Joan H. Strand; Jacob A. Stein; Marna S. Tucker; Mark H. Tuohey Iii; Robert L. Weinberg; Robert N. Weiner; Charles R. Work; The Federation of Citizens Associations of the District Of Columbia; The Washington, D.C. Federation of Civic Associations.

INTEREST OF THE AMICI CURIAE

Amici are the District of Columbia Chamber of Commerce, the Federal City Council, the District of Columbia Affairs Section of the District of Columbia Bar (the "D.C. Affairs Section"), certain individuals who are former presidents of the District of Columbia Bar (the "former Bar presidents"), the Federation of Citizens Associations of the District of Columbia, and the Washington, D.C. Federation of Civic Associations.[2]

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[1] The parties have consented to the filing of this brief under Supreme Court Rule 37.2, and their letters of consent have been lodged with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *amici* state that counsel for a party did not author this brief in whole or in part and that no one other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] With respect to the D.C. Affairs Section and the former Bar presidents, the views expressed herein are those of such Section and individuals, respectively, and not those of the D.C. Bar or its Board of Governors.

The District of Columbia Chamber of Commerce is the Washington D.C. metropolitan region's largest chamber of commerce, with over 2000 members from the private and nonprofit sectors. The Federal City Council is a business-supported, non-profit, non-partisan organization that works for the improvement of the Nation's Capital. It is composed of and financed by two hundred of the Washington, D.C. area's top business, professional, educational, and civic leaders. The D.C. Affairs Section is concerned with the laws and government of the District of Columbia (the "District"). Its membership includes both individuals who live in the District and individuals who live elsewhere. The Federation of Citizens Associations of the District of Columbia was founded in 1910 and has over forty-five member associations, most of which have several hundred members. The purposes of the Federation are to work for the strengthening of residential communities and neighborhoods and to further the interests of the people of the District. The Washington, D.C. Federation of Civic Associations was founded in 1921 and represents over forty citizens and member associations. It is dedicated to informing, supporting, and representing the residents of the District and is a recognized voice for the District's general welfare.

Amici have a keen interest in the economic health and well-being of the District of Columbia. In the case of the amici D.C. Affairs Section and former Bar presidents, such interest arises because the District is where its members, or they, as the case may be, practice or have practiced their profession. In the cases of the Federation of Citizens Associations of the District of Columbia and of the Washington, D.C. Federation of Civic Associations, it is because the District is where the members of their member organizations live. In the case of the Federal City Council, it

is because its mission is to work for the improvement of the Nation's Capital. And in the case of the District of Columbia Chamber of Commerce, it is because its members operate their businesses there.

All amici are concerned that the continued federal ban found at D.C. Code § 1-206.02(a)(5) on the District government's ability to tax the income of those who work in the District but live elsewhere (the "Prohibition") seriously threatens the economic vitality of the District of Columbia. Amici further believe that the District is treated inconsistently and unfairly when compared to all other states and territories that choose to impose an income tax.[3]

Although the District has managed to reverse the financial insolvency that prompted Congress to create a financial control board a decade ago, an in-depth study by Congress' own investigative arm, the Government Accountability Office ("GAO") (formerly known as the General Accounting Office), shows that this recent fiscal success is not sustainable. According to the GAO, this bleak outlook is the result of a "structural imbalance" in the District's ability to raise revenue to provide basic services, a key aspect of which is the Prohibition. *See District of Columbia: Structural Imbalance and Management Issues*,

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[3] Some of the individual amici live and work in the District. Others work in the District but live elsewhere. Still others, by virtue of retirement or relocation, neither work nor live in the District. Consequently, the elimination of the Prohibition and its replacement by a reciprocal income tax credited against their own state income taxes will most likely affect them in their respective capacities as individual taxpayers differently. Despite those differences, the individual amici join in submitting this brief because they share a common interest in the continued vitality of the District.

GAO 03-666 (May 2003) at 8-9 (hereinafter "GAO Report"). Amici are deeply concerned that, because of this structural imbalance, the District will once again become fiscally insolvent or will be unable to provide an adequate level of basic governmental services. Either would be detrimental to the District's economy and well-being.

Amici also are troubled by the Prohibition's unfairness. The federal government does not impose a similar ban on any other jurisdiction in the United States. Consequently, each of the forty-one states that imposes an income tax on individuals applies that tax to nonresidents who work in the state. Moreover, the Prohibition was enacted at the behest of the representatives of the several States, which enjoy voting rights in the Congress of the United States, while the District does not. Just as importantly, the Prohibition – both in its own right and because the resulting structural imbalance contributes to an environment of uncertainty, inadequate services and decaying infrastructure – unfairly discriminates against the District in its effort to attract and retain residents and employers and to promote economic opportunity for its citizens.

Amici believe that the District's economic future is jeopardized by the Prohibition. Therefore, amici urge the Court to grant the petition for a Writ of Certiorari and review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

SUMMARY OF ARGUMENT

In the proceedings below, Petitioners raised serious questions about the constitutionality of the Prohibition. The amici agree with Petitioners that this case presents important

issues that this Court should consider. Amici also agree with Petitioners that, if the Writ is granted, this Court should hold, after hearing this case, that heightened scrutiny is required and that the Complaint should be reinstated so that such scrutiny may be applied.

The amici do not address in this brief the substantial questions of constitutional law which they believe the Petition presents, leaving that task to Petitioners' Brief. They wish, instead, to emphasize through their arguments here two points in that brief regarding the nature of the Prohibition and its effect on the District which they believe underscore why those constitutional issues, as present in this case, are important enough to warrant review by this Court. The first is that the Prohibition is a singular limitation on the rules otherwise generally followed and applied by governments regarding the reach of their tax authority. Thus, both it and the discrimination effected thereby are unique. The second is that the Prohibition seriously undermines and jeopardizes the future fiscal health of the District because of its severe detrimental effect on the District's finances and ability to provide basic services. For these reasons as well as for the reasons set forth in Petitioners' Brief, and in light of the District's significance as the Seat of Government, this case is worthy of the Court's review.

ARGUMENT

I. THE PROHIBITION IS THE ONLY LAW OF ITS KIND IN THE UNITED STATES.

A. The Universal Rule of Taxation is That Income is Taxed at Its Source.

It is fundamental that a jurisdiction can tax income earned within its borders. *See Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 463 n.11 (1995); *Shaffer v. Carter*, 252 U.S. 37, 52 (1920); Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* ¶ 6.03 (3d ed. 1999) ("There are two fundamental, but alternative, predicates for state power to tax income: residence and source."). This fundamental rule is rooted in the principle that the cost of government should be paid for by those who benefit from it. *See Oklahoma Tax Comm'n*, 515 U.S. at 463; *Shaffer*, 252 U.S. at 52-53.

For a state's residents, the "[e]njoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government." *Oklahoma Tax Comm'n*, 515 U.S. at 463 (quoting *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 313 (1937)). For nonresidents, the "very fact that a citizen of one state has the right to hold property or carry on an occupation or business in another is a very reasonable ground for subjecting such nonresident . . . to the extent of his property held, or his occupation or business carried on therein, to a duty to pay taxes . . . ." *Shaffer*, 252 U.S. at 53. Indeed, taxing income according to source is such a bedrock concept that the leading commentators on state taxation have noted that, if for Constitutional reasons (such as to avoid double taxation

under the Commerce Clause) a choice had to be made between taxing by residence or by source, taxing by source would in their view trump taxing by residence. *See* Hellerstein & Hellerstein, *State Taxation* ¶ 6.03.

This Court first recognized the right of a jurisdiction to tax the income of nonresidents in 1920 in *Shaffer v. Carter*. Noting that a government may "resort to all reasonable forms of taxation in order to defray . . . government expenses" and that income taxes are a favored method of distributing the burdens of government, the Court held that a nonresident who holds a job or operates a business in a state has an *obligation* to pay for the cost of that state's government, from which the nonresident benefits. *Shaffer*, 252 U.S. at 50-53.

B. The Rule is Followed by the United States and Every State that Imposes an Income Tax.

As noted above, it is fundamental that a jurisdiction can tax the income earned within its borders. Just as importantly – and what makes the Prohibition so astonishingly unique – both the United States and every state that imposes an income tax exercise this authority.

Thus, the United States taxes the income of nonresidents earned within its borders, although the Executive Branch (with the consent of the Senate) may choose to limit this in bilateral treaties entered into with other countries. *See* 26 U.S.C. §§ 871(a) and 871(b) (taxation of nonresident individuals on interest, dividends, royalties, etc. and on trade or business income, respectively, derived from within the U.S.) and 26 U.S.C. §§ 881(a) and 881(b) (same for foreign corporations). Indeed, United States income tax

statutes have provided for such taxation of nonresidents since at least 1894. *See* Joseph Isenbergh, *U.S. Taxation of Foreign Persons and Foreign Income* ¶ 30.2 (2002 ed.).[4] U.S. tax law specifically provides that (with some exceptions adopted for reasons not relevant here) income derived by a nonresident from the performance of services within the United States is subject to its income tax. *See* 26 U.S.C. § 864(b)(1).

Similarly, every state that has an income tax takes the same approach. That is, each such state has exercised the authority that this Court in *Shaffer* affirmed it had and taxed the income earned by nonresidents within its borders. *See* St. Tax Guide (CCH) ¶ 200 *et seq.* (listing state statutes authorizing taxation of all income earned within the state). Even Puerto Rico and the Virgin Islands do so. *See* P.R. Laws Ann. 13 § 8605 (1995); 33 V.I. Code Ann. § 541 (1986). None – not a single one – gives nonresidents a "free pass."[5] To avoid double-taxing residents who work in other states, states typically provide their residents with a credit for the income tax they paid the state where the income was earned, up to the amount of tax such residents would otherwise have owed to their home state on such income. Maryland and Virginia are no different in this regard, since each would allow a credit against its income tax for income

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[4] Prof. Isenbergh, like Professors Hellerstein, is a leading authority in his field, and his treatise, like theirs, was cited by this Court in *Chickasaw Nation*.

[5] To be sure, some states choose to enter into a treaty (a "reciprocal agreement") with some neighboring states whereby each agrees not to tax the wages or salaries earned by residents of the other. *See* St. Tax Guide (CCH), Charts ¶ 700-600 (Jan. 2005). States may decide whether to enter into a reciprocal agreement and presumably do so when it does not harm them economically and is to their administrative or other benefit.

taxes paid to the District. *See Roach v. Comptroller of the Treasury*, 610 A.2d 754 (Md. 1992); *Mathy v. Dep't of Taxation*, 483 S.E.2d 802 (Va. 1997). So, the proposed nonresident income tax payable to the District would be offset by a credit against the income tax due to a nonresident's home state. (*See* Pet'rs Br. 8).

Indeed, the taxation of nonresidents on the income they earn within a jurisdiction is such a fundamental principle of public finance that it extends not just to those who travel every day from their home in one jurisdiction to their place of business in another but also to those who may have been in the jurisdiction only briefly. And taxing authorities can be quite vigorous in assuring that the tax is collected on income earned during such brief stays, at least if the amount is enough to warrant the effort.

This is true with respect to U.S. income taxation. *See, e.g., Ingram v. Bowers*, 47 F.2d 925 (S.D.N.Y. 1931), *aff'd*, 57 F.2d 65 (2d Cir. 1932) (involving the royalties which the famed Italian singer Enrico Caruso received for recording a few songs at the New Jersey studio of The Victor Company pursuant to a 1909 agreement, which were subject to U.S. tax as payments for services performed in the U.S. even though derived in part from foreign record sales). *See also Johansson v. United States*, 336 F.2d 809 (5th Cir. 1964) (U.S. income taxation of the Swedish heavyweight boxer Ingemar Johansson on the purses he received from his celebrated prize fights with Floyd Patterson). And it is equally true with respect to state taxation. For example, the Commonwealth of Virginia has imposed its income tax on Tennessee residents who work at a hospital that straddles the

Tennessee/Virginia border. *See* Tenn. Op. Atty. Gen., No. 84-193 (Tenn. A.G. 1984).[6]

Congress has denied only the District, alone among all U.S. jurisdictions, the benefit of taxing all income earned within its borders. Congress has not denied itself, or any other jurisdiction except the District, the right to tax income earned within its borders. The Prohibition is truly one of a kind.

II. THE PROHIBITION HAS A SEVERE DETRIMENTAL EFFECT ON THE DISTRICT'S FISCAL HEALTH.

Because of the Prohibition, the District must over-tax D.C. residents in order to provide merely a basic level of public services. GAO Report at 12. Furthermore, the District's finances are constrained by a substantial "structural imbalance" that ensures the District's expenditures will constantly outpace the city's ability to raise revenue. *Id.* at 4, 12.

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[6] For other examples of the lengths to which states are willing to go to tax nonresidents, *see* Richard R. Hawkins, Terri Slay & Sally Wallace, *Play Here, Pay Here: An Analysis of the State Income Tax on Athletes*, 26 State Tax Notes (Nov. 25, 2002) (reporting on a survey the authors conducted of state income taxation of visiting professional athletes and indicating that each of the twenty-five states which completed the survey stated that they taxed the income such visiting athletes earned when playing the state's home team(s)). *See also Speno v. Gallman*, 35 N.Y.2d 256 (1974) (nonresident employee of a New York business required to pay New York income tax on portion of salary attributable to days he worked from his home in New Jersey where employee's business activities were for his convenience, rather than for the convenience of the employer).

This annual structural deficit is beyond the control of the District's elected officials and amounts to between $470 million and $1.1 billion each year. GAO Report at 8, 12. Even if the District were to cut expenditures further, conduct operations as efficiently as possible, and impose higher taxes on its citizenry, the structural imbalance would remain. *Id.* at 15. And leading Washington area business and civic groups have all recognized that this structural imbalance has impaired the District's ability to attract new residents and businesses, provide necessary services, and maintain infrastructure. *See* Testimonies of Fred Thompson, President, Federal City Council, Ted Trabue of the Greater Washington Board of Trade, and Stephen J. Trachenberg, Chairman of the Board, D.C. Chamber of Commerce before the Subcommittee on the District of Columbia of the Senate Committee on Appropriations, June 22, 2004. Moreover, the GAO report illustrates that a key factor driving the structural imbalance is the Prohibition.[7] GAO Report at 43. Because of the Prohibition, the District is unable to tax two-thirds of the income earned in the city, which amounts to over $30 billion annually. (Pet. App. 69a-70a).

The Prohibition has a particularly insidious effect on the District's efforts to promote economic opportunity for its residents and grow its way out of any fiscal imbalance. As do other jurisdictions, the District attempts, through property tax abatements and other incentives, to persuade employers to remain or locate in the District. Because of the

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[7] Other constraints include: (1) the District's inability to tax 42% of the real property in the city because that property is owned by the federal government, foreign governments, or international institutions; and (2) the limitation resulting from the federally-imposed height restrictions on D.C. structures on the District's ability to tax high-density real property. GAO Report at 43.

Prohibition, however, it competes on a less-than-level playing field in these efforts. Since so many of those who work in the District live in Maryland or Virginia,[8] much of the increased job opportunities and enhanced tax revenues resulting from the District's efforts inures to the benefit of the neighboring states. Given that a substantial portion of the new jobs will be filled by commuters living in Virginia or Maryland (or other states), it is those states that will enjoy the largest share of the increased tax revenues generated by those jobs. This leaves the District with only modest left-overs, such as income tax from the small fraction of employees living in the District, some sales tax on the employees' meals and sundries, and (if the employer is not an exempt institution) some income tax from the business.[9] In other words, although the District expends the resources, because of the Prohibition it is the neighboring states that reap much of the reward.

Thus, because of the Prohibition, the District truly faces a catch-22 dilemma. Either it does nothing to attract

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[8] The 2000 Census indicates that more than 2 out of every 3 jobs in the District are filled by non-residents. U.S. Census Bureau, *County-to-County Worker Flow Files*, at http://www.census.gov/population/www/cen2000/commuting.html#DC.

[9] Indeed, in light of a recent decision of the D.C. Superior Court holding that the District's franchise tax on unincorporated rental real estate businesses violates the Prohibition insofar as it burdens nonresident individuals who are owners thereof, it is entirely possible that all business income earned in the District by nonresidents – not just from personal or professional services provided by the nonresident but also from such capital-intensive, purely local activities as retail sales or rental real estate – will be excluded from income tax in the District unless the business (or its owners) choose for regulatory or other reasons to incorporate. *See Bender v. District of Columbia*, No. 8524-05 (D.C. Super. Ct., Mar. 8, 2006).

and retain employers in the face of constant criticism to do more, or it does what it can even though much of the benefit will flow to its neighbors.[10] Accordingly, the suggestion in the Opinion of the Court of Appeals that the Prohibition may have been prompted by a concern that, otherwise, employers might decide to move out of the District rather than subject those of their employees who do not live in the District to the District's high tax rates (*see* Pet. App. 11a) is quite ironic and misperceives what is the cause and what is the effect: it is not that high rates caused the Prohibition; rather, as shown in the

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[10] Consider, for example, the debate over the last few years regarding the relocation of a Major League Baseball team to Washington, D.C. The mean baseball team payroll is approximately $69,000,000. USA Today, Inc., *USA Today Salaries Database*, at http://asp.usatoday.com/sports/baseball/salaries/totalpayroll.aspx?year=2005. Many states apportion a team member's income based on "duty days" and apply a rule that there are roughly 220 duty days in a baseball season. Thomas Heath & Albert Crenshaw, *In Professional Sports, States Often Claim Players*, *Wash. Post*, Feb. 24, 2003, at D1. In a 162-game season, there would be 81 games in the District. Because of the Prohibition, however, even a home team player – let alone a visiting team team player – would not be subject to D.C. income tax on income attributable to playing games in the District unless he maintained a permanent home in the District rather than, per general commuting patterns, in Virginia, Maryland, or where he lives during the off season. If the Prohibition did not apply and the District could tax the income of such home team and visiting team players, and assuming there are 85 duty days in the District for home team players and personnel, 81 duty days for visiting team players and personnel, and an average payroll for both the visiting and home teams, this would yield a tax base of approximately $52,063,000 ([81+85)/220] x $69,000,000). If you applied an average tax rate on this income of 7% – for 2005, the District's highest marginal tax rate was 9% on taxable incomes over $30,000 – this would yield annual revenue of $3,644,000, which would produce $109,000,000 over 30 years. Whatever are the merits of a new baseball stadium – on which amici intend no comment – the debate over those merits would likely have been much different if the Prohibition did not apply and this revenue stream had been available to help underwrite the stadium's cost.

GAO Report and Petitioners' Brief, it is the Prohibition that has caused high rates.

Removal of the Prohibition would permit a significant reduction in the structural imbalance and would place the District in the same position as other taxing jurisdictions that can tax income at its source. Nonresidents who work in the District benefit from public safety and public works-related services provided by the District. As an example, approximately eighty percent of all of the cars that benefit from the District's infrastructure are from Maryland and Virginia, yet the District cannot tax the income of car owners who work in the District to help pay for road maintenance. 148 Cong. Rec. E311 (daily ed. Mar. 11, 2002). As the Supreme Court noted in *Shaffer*, nonresidents who earn a living in a jurisdiction and benefit from governmental services in that jurisdiction have an obligation to contribute to the costs thereof. The Prohibition creates an unfair and discriminatory exception to this rule with respect to the District.

CONCLUSION

The Prohibition constitutes a unique departure from the rule that is otherwise generally applied that income can and will be taxed at its source. Furthermore, as outlined in the GAO Report, the Prohibition jeopardizes the District's financial health. For these reasons, and for those stated in Petitioners' Brief, the amici urge the court to grant a Writ of Certiorari as requested by Petitioners.

Respectfully submitted.

Joseph A. Rieser, Jr.
Counsel of Record
Joseph R. Price
ARENT FOX PLLC
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
(202) 857-6000

Counsel for *Amici Curiae*

Of Counsel:

Jon S. Bouker
ARENT FOX PLLC
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
(202) 857-6183

James S. Bubar, Esq.
1776 K Street, N.W., Suite 800
Washington, D.C. 20006
(202) 223-2060
Co-Chair, District of Columbia Affairs Section
of the District of Columbia Bar

Charlotte Brookins-Hudson, Esq.
1350 Pennsylvania Ave., N.W.
Suite G-4
Washington, DC. 20036
(202) 331-0833
Co-Chair, District of Columbia Affairs Section
of the District of Columbia Bar